Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

EDDYEMAE R. BEARDS, ET AL.,

Petitioners,

vs.

THE BIBLE WAY CHURCH OF OUR LORD JESUS CHRIST OF THE APOSTOLIC FAITH OF WASHINGTON, D.C. ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AN EMPLOYEE OF A RELIGIOUS ORGANIZATION, OR CHURCH, WHO PERFORMS PURELY SECULAR WORK PURSUANT TO AN AT-WILL EMPLOYMENT CONTRACT, IS PRECLUDED FROM BRINGING A VIABLE CIVIL ACTION AGAINST A RELIGIOUS INSTITUTION, OR CHURCH, FOR BREACH OF AN EMPLOYMENT CONTRACT IN VIOLATION OF THE FREE EXERCISE AND ESTABLISMENT CLAUSE, FIRST AMENDMENT, UNITED STATES CONSTITUTION?

II. WHETHER AT-WILL EMPLOYMENT CONTRACTS WHICH ARE TRADITIONALLY SANCTIONED AND UPHELD BY CIVIL COURTS, UNDER COMMON LAW CONCEPTS, IS EQUIVALENT TO ENFORCING LAWS WHICH IMPAIR THE OBLIGATION OF CONTRACT IN VIOLATION OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION?

III. IN AREAS WHERE LEGISLATURES HAVE REFUSED TO ENACT STATUTES DEALING WITH THE RIGHT TO JOB SECURITY, BUT WHERE CIVIL COURTS ENFORCE COMMON LAW DOCTRINES, SUCH AS AT-WILL EMPLOYMENT CONTRACTS, WHETHER THAT VOID RISES TO THE LEVEL OF STATUTORY ENACTMENT, OR LEGISLATIVE AFFIRMATION, WITHIN THE CONTEXT OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION AND IS PROHIBITED THEREUNDER?

PARTIES TO THE PROCEEDINGS

The parties to the consolidated appeals in the court below were those parties named in this Petition. In the Appeals below, the following parties were named as either Appellants or Appellees: The Bible Way Church of Our Lord Jesus Christ Of The Apostolic Faith of Washington, D.C., Incorporated; Reverend James Silver; Yvonne Williams; Wendell M. Slade; Jerome Stevens; and Jeanne Marshall. The parties named in the leading civil action and in the consolidated appeals below were: Eddyemae R. Beards and Julius Beards.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a judgment and opinion of the District of Columbia Court of Appeals entered on OCTOBER 30, 1996 in the above cause.

OPINIONS BELOW

The Memorandum Opinion and Judgment by the District of Columbia Court of Appeals appears in the Appendix hereto at A-1. [The decision is reported]. An order denying the petition for rehearing by the District of Columbia Court of Appeals appears in the Appendix hereto at A-2. [The Order is unreported].

JURISDICTIONAL STATEMENT

The Memorandum Opinion and Order of the District of Columbia Court of Appeals was entered on JULY 24, 1996. The Order denying Petition for Rehearing was entered on OCTOBER 30, 1996. This Petition has been filed within 90 days of that date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I, U.S. Constitution provides as follows:

"Congress shall make no law representing an establishment of religion, or prohibiting the free exercise thereof; * * * "

Article I, Section 10, Cl. 1, provides as follows:

"No State shall * * * pass any law impairing the Obligation of Contracts, * * * "

Amendment XIV, provides as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment I, U.S. Constitution, provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * "

STATEMENT OF THE CASE

The two (2) consolidated appeals out of which this Petition for Certiorari arose, involve two civil actions brought by Petitioner, Eddyemae R. Beards, and her husband, Julius Beards, against The Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C., Incorporated. The two (2) actions also named the

Pastor and individual members of the Board of Trustees of the Church.

In the first complaint filed in the Superior Court of the District of Columbia, Petitioners sought damages arising out of (a) Wrongful Discharge from Employment, (b) Defamation, (c) Retaliatory Discharge, and (e) Harassment.

In the second complaint, Petitioner sought; (a) Class Action Certification pursuant to Rule 23, S.C.Civ.R.; (b) For Declaratory Order or Judgment; and (c) for Order appointing a Receiver to take charge of Church business affairs and details.

The trial court entered a series of Orders which included, inter alia, (a) Staying Discovery while the First Amendment Issue was pending; (b) Order granting dismissal of the Complaint for failure to state a cause of action upon which relief could be granted, Rule 12 (b) (6), S.C.Civ.R.. In the second civil action, the trial court entered Orders; (a) Denying Class Certification; (b) Summary judgment dismissing Petitioners' Count seeking a Declaratory Judgment or Order; and (c) Denying Petitioners' request for appointment of a receiver to take charge of church business affairs.

Petitioners filed timely notices of appeal to the District of Columbia Court of Appeals. Both appeals were consolidated and were argued.

On July 24, 1996, the District of Columbia Court of Appeals affirmed the Trial Court's action in both cases. [Appendix A-1]. Petitioners filed a Petition for Rehearing and for Rehearing En Banc. On October 30, 1996, the

District of Columbia Court of Appeals denied the Petition for Rehearing and for Rehearing En Banc. [Appendix A-2].

It is from the denial of the Petition for Rehearing and for Rehearing En Banc on October 30, 1996, that Petitioners filed this Petition seeking Certiorari because of several critical and new issues under the First Amendment and Article I, Section 10 of the United States Constitution. Petitioners contend that there is a conflict among the circuits and among the Supreme Courts of the States within the Union.

In a case of first impression, Petitioners appeal to this Court to construe and decide whether or not State Courts act as Arms or Agents of the State? Whether or not the continuous sanctioning of the At-Will Employment Doctrine, having common law origin, constitutes state actions which impairs the obligation of contracts of employment, particularly during times of challenges to job security and more particularly, the adaptation of the common law At-Will doctrine after July 4, 1776 [American Revolution] during which time, most ties, if not all ties, were severed with England. Finally, Petitioners contend that the continuous perpetuation and affirmance of the common law At-Will Employment Contract doctrine, by State Courts, shields State Legislatures in contractual situations where they fail to act. Such silence constitutes inaction on the part of State Legislatures, on the one hand, while affirming a common law doctrine which impairs the obligation of contracts, on the other hand, which States are prohibited pursuant to Article I, Section 10, of the United States Constitution, by judicial enforcements of the common law doctrine.

STATEMENT OF FACTS

Bible Way Church of our Lord Jesus Christ of the Apostolic Faith of Washington, D.C., Incorporated, the main Defendant/Respondent, is a tax-exempt religious organization which was organized under the laws of the District of Columbia in 1936, pursuant to D.C. Code #29-901 et seq. (1991 Repl.). Bible Way maintains a congregation of approximately 3,000, or more, members and has been continuously active in the District of Columbia since the date of its founding by Bishop Smallwood E. Williams [now deceased]. As a qualifying religious organization, Bible Way Church is not required to file federal or District of Columbia income-tax returns or annual reports required of corporations in the District of Columbia.

Petitioner, Eddyemae R. Beards became a member of Bible Way Church, etc. on May 13, 1951, and began working as a church volunteer in 1963. In 1979, Bishop Smallwood Williams, now deceased, and then pastor of the church, hired her to work as a part-time employee. As late as 1991, weekly, Petitioner worked approximately forty to forty-five hours for the church. Petitioner, Julius Beards, had been a Deacon in the church for well over twenty-five years. As part of Deacon Beards' duties, weekly offerings [money] were personally delivered by him to the Home of Bishop Smallwood Williams, rather than at some other depository for church funds. Petitioner, Eddyemae R. Beards, in addition to her duties as an Administrator, served on numerous Committees in the Church. Several years before his death, Bishop Williams appointed Petitioner as the Financial Secretary of the Church.

On June 28, 1991, Bishop Smallwood Williams died. After his death, Respondent James Silver was appointed as Pastor of Bible Way. In 1991, James Silver, the pastor, entered into a contract of employment with Petitioner, Eddyemae Beards under which she continued to work as the Financial Secretary of the Church. Petitioner's duties consisted of, inter alia, preparing a monthly account for the Church; keeping financial records of payments made by members of the congregation; preparing weekly salary checks for employees; preparing federal and District of Columbia tax documents and forms. Petitioner's duties were purely secular. Her duties did not consist in any way of rendering any duties or activities affecting religious beliefs and practices. Nor did her duties involve the preaching of church ecclesiastical doctrine.

Petitioner, Eddyemae R. Beards, recognized and discovered, early on, that millions of dollars, which came into the church coffers, were not fully accounted for. For example, each year, Bible Way raised well over $125,000 from the church's yearly banquet held at the Hyatt Hotel in Washington, D.C.; funds were spent for the perpetuation of weekly radio and televangelical services; thousands of dollars were raised from well over twenty (20) church organizations, church rallies, fund raisers, and weekly tithes assessed against members, which consisted of well over three thousand, or more, members. Yet, the Board of Trustees never rendered any accountings to the general membership at large.

A dispute arose between Respondent James Silver, the pastor, and members of the Board of Trustees, in January, 1992. During this month, Petitioner, Eddyemae R. Beards, as part of her duties, paid a salary check to

Elder Wallace Williams [son of Bishop Smallwood Williams] who had been removed from his position at the church as an Elder by his father, Bishop Williams. According to Federal Tax Regulations, including withholding of Social Security taxes, etc., Petitioner issued a check in the amount of $15,600.00 to Elder Wallace Williams. The issuance of the check incensed Pastor James Silver, who, after making several defamatory statements about and concerning Petitioner, decided to terminate her under the disguise of an administrative church reorganization. Petitioner had always contended that by law, she was required to comply with withholding requirements under the Federal and State tax laws and that she could not withhold taxes, truthfully, unless she had in fact issued a salary to Elder Wallace Williams.

On December 1, 1993, Petitioner, Eddyemae R. Beards was terminated from employment after having served Bible Way Church faithfully for well over thirty (30) years.

The dues paying members of Bible Way Church were, for all intents and purposes, Religious Consumers. As such, they were entitled to yearly accounting of funds contributed by them. Not having ever rendered a yearly accounting to the membership, the Trustees, and the Bishop, siphoned funds from the Church Coffers and diverted those funds to another program or agenda. Under this program, or agenda, Bible Way Church acquired Apartment Buildings and other real property, a grocery store, funds were used to establish a Trust which was reflected in the Last Will and Testament of Bishop Williams. The District of Columbia Court of Appeals held, however, that no such Testamentary Trust existed

under the Last Will and Testament of Bishop Williams, even though the Last Will and Testament specifically named The Bible Way Church as residual legatee and devisee.

REASONS FOR GRANTING THE WRIT

(I)

THE DECISION BY THE DISTRICT OF COLUMBIA COURT OF APPEALS CONFLICTS WITH DECISIONS BY THIS COURT AND WITH DECISIONS ISSUED BY VARIOUS STATE SUPREME COURTS ON THE RIGHT OF A SECULAR EMPLOYEE TO BRING A CIVIL ACTION IN A CIVIL COURT AGAINST A RELIGIOUS INSTITUTION, OR CHURCH, NOTWITHSTANDING THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court has held, time and time again that, as a general rule, civil courts are constitutionally impermissible forums for the adjudication, or resolution, of ecclesiastical disputes. Serbian Eastern Orthodox Diocese v. Milivojevich ("Serbian"), 426 U.S. 696, 710, 96 S. Ct. 2372 (1976); Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 449, 89 S. Ct. 601 (1969); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116, 73 S. Ct. 143, 154 (1952); Gonazlez v. Roman Catholic Archbishop, 280 U.S. 1, 50 S. Ct. 5 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 666 (1871).

Federal Circuit Courts have held that ecclesiastical decisions are generally beyond the jurisdiction of secular courts. Rayburn v. General Conf. of Seventh-Day Adventists, 772 F. 2d 1164, 1167 (4th Cir., 1985), cert. denied, 478

U.S. 1020, 106 S. Ct. 3333 (1986); Kaufman v. Sheehan, 707 F. 2d 355, 358 (8th Cir., 1983); McClure v. Salvation Army, 460 F.2d 553, 560 (6th Cir., 1972). The dispute between the Petitioners and the Respondents did not involve conflicts arising out of the preaching of church values, its messages, nor did the conflict involve interpretation of church doctrine to the membership or the world at large. Rayburn v. General Conf. of Seventh-Day Adventists, supra, at 1167-68. Nor did the dispute arise out of the church's choice of its religious representatives. Rayburn v. General Conf. of Seventh-Day Adventists, supra; Kaufman v. Sheehan, supra; McClure v. Salvation Army, supra. The dispute was not one which involved the employment or status of a minister or pastor which is not subject to judicial review by a civil court. Hutchison v. Thomas, 789 F. 2d 392 (6th Cir., 1986); cert. denied, 107 S. Ct. 277 (1986); Simpson v. Wells Lamont Corporation, 494 F.2d 490 (5th Cir., 1974); Knuth v. Lutheran Church Missouri Synod, 643 F. Supp. 444 (D. Kans., 1986).

The dispute between the Petitioners and the Respondents arose out of the breach of an employment contract by Bible Way Church which directly affected the employment status of the Petitioner, the Financial Secretary of the Church. State Supreme Courts have carved an exception to the First Amendment prohibition pursuant to the establishment and free exercise clauses under that amendment. Where an employee, who performs purely secular functions for a religious organization, or church, has valid, legal grounds for suing the church, the latter is not immune. Indeed, there is authority for the view that where an employee has provided a purely secular service for the church, civil courts have extended jurisdiction.

Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 330-32, 107 S. Ct. 2862, 2865-66 (1987) [a case in which the Civil Rights Act applied to the editorial secretary in a church publishing house]; EEOC v. Mississippi College, 626 F. 2d 477 (5th Cir., 1980), cert. denied, 453 U.S. 912, 101 S. Ct. 3143 (1981) [a case in which the Civil Rights Act was applied to a secular employment decision of a religious institution]. The dispute between the Petitioners and the Respondents did not arise out of matters involving church government, nor as to matters of faith and doctrine. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, supra.

Federal circuit courts have held that a church is not above the law and may be held liable for valid contracts. Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F. 2d 1354, 1356 (D.C. Cir., 1990); Rayburn v. General Conf. of Seventh Day Adventists, supra; EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir., 1981, cert denied, 456 U.S. 905, 102 S. Ct. 11749 (1982); EEOC v. Pacific Press Publishing Ass'n, supra; EEOC v. Mississippi College, supra; Whitney v. Greater New York Corporation of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y., 1975).

Aside from carefully defined distinctions, the ultimate question is whether or not a trial court's exercise of jurisdiction in a civil action between a secular employee and the church poses a significant risk of violating the First Amendment. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979).

(II)

THE DISPARATE AFFIRMATION AND APPLICATION OF THE AT-WILL EMPLOYMENT RULE BY CIVIL COURTS CONSTITUTE STATE ACTION WHICH (A) IMPAIRS THE OBLIGATION OF CONTRACTS PROHIBITED BY ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, AND (B) DENIES CITIZENS PRIVILEGES AND IMMUNITIES AND EQUAL PROTECTION OF THE LAWS GUARANTEED UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioners contend that a resolution of the At-Will Employment doctrine and its continued application by civil courts throughout the United States affect a substantial number of the American Work Force. Indeed, according to some studies, "appropriately eighty-three million people, are employed under the at-will doctrine."[1] The study also found that "some 1.4 million of these workers are terminated from their jobs each year."[2] One million employees are discharged by private industry annually without a fair hearing.[3] In 1987, one study discovered that as many as 200,000 of these at-will employees are wrongfully discharged each year.[4]

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[1] See, Comments, Pratt, Richard J., "Unilateral Modification of Employment Handbooks: Further Encroachments On The Employment-At-Will Doctrine", 139 U. Pa. L. Rev. 197 (Nov., 1990, No. 1)

[2] Id. pp. 197, note 1, cf. U.S. Bureau of Census, Dep't Commerce, Statistical Abstract of the United States: 1990, at 418.

[3] Id. pp. 197, note 1, cf. Maltby, The Decline of Employment At Will-A Quantitative Analysis, 41 Lab. L. J. 51, 53 (1990).

[4] Id. pp. 197, note 1, cf. Abbassi, Hollman & Murrey, Employment at Will: An Eroding Concept in Employment Relationships, 38 Lab. L.J. 21 (1987).

A. THE AFFIRMATION AND APPLICATION OF THE AT-WILL EMPLOYMENT DOCTRINE, AFFECTING EMPLOYMENT RELATIONSHIPS, AND THE CONTINUOUS AFFIRMATION BY CIVIL COURTS IS THE TYPE OF IMPAIRMENT WHICH ARTICLE I, SECTION 10, WAS INTENDED TO PROHIBIT BY THE STATES

The purpose of the contract clause was to exercise restraint on State economic action and State Laws affecting private contracts. But in 1819, the Court extended the prohibition clause to public as well as private contracts. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). The policy behind the contract clause required that any legislation affecting private contracts must be addressed to a legitimate end. In El Paso v. Simmons, 379 U.S. 497 (1965), the Court reasoned that laws that restrict a party to gains reasonably to be made from a contract are not subject to attack under the clause. While the contract clause is not an absolute prohibition against any impairment of contracts, it does not operate to obliterate State Police Powers. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). In Allied Structural Steel Co., supra, this Court held that to survive a contract clause challenge, the statue statute, or state policy, or law, must meet a four (4) pronged test. That is;

1. It must deal with a broad, generalized economic or social problem.

2. It must operate in an area already subject to state regulation where the contract was made.

3. It must effect merely a temporary alteration of contractual relationships.

-and-

4. It must apply to a board class of persons.

In Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983), however, this Court applied a three (3) pronged test. If the State substantially impairs a contractual relationship, It must; (1) have a significant and legitimate public purpose for doing so; (2) If it does, and the contractual adjudgement is reasonable and appropriate, the court will defer to the state itself unless the state is a party to the contract.

B. THE CONTINUED APPLICATION OF THE AT-WILL EMPLOYMENT DOCTRINE BY STATE CIVIL COURTS CONSTITUTES STATE ACTION AND AUTHORITY IN THE FORM OF LAWS, CUSTOMS, JUDICIAL AND/OR EXECUTIVE PROCEEDINGS.

Article I, Section 10 of Amendment 14 of the United States Constitution speaks to state action in the form of clear prohibitions. Article I, Section 10, provides, that no state shall pass any law impairing the Obligation of Contracts. Amendment 14, provides that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens; nor deny to any person within its jurisdiction the equal protection of the laws.

Actions by State Civil Courts in exercise of State Powers in pronouncement and affirmation of the at-will employment rule, customs, or judicial or executive proceedings constitute state action. See, Civil Rights Cases,

109 U.S. 3, 11, 17 (1883); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991); Shelley v. Kraemer, 334 U.S. 1, (1948). In examining whether the actions involved constitute state action, this Court may consider not only legislative facts, but adjudicative facts as well. Brown v. Board of Education, 347 U.S. 483 (1954).

C. THE AT-WILL EMPLOYMENT DOCTRINE, ITS' EVOLUTION, UNIFORM APPLICATION, AND THE SIGNIFICANT ADVERSE IMPACT ON THE AMERICAN WORK FORCE.

In examining the unveiled underpinnings of the at-will employment doctrine, this Court will find that the Fifty (50) States of the Union have upheld and sanctioned the enforcement of the rule or doctrine. Notwithstanding clear economic changes and the discriminatory effect [when comparing unionized collective bargaining agreements protecting Union members, with the at-will employment contracts affecting non-union workers of the rank and file class], the at-will doctrine, facially, egregiously intrudes upon constitutionally protected interest to the extent that it is impossible to segregate permissible application from impermissible application in such a way that does not substantially erode or abolish constitutional freedoms. Waters v. Barry, 711 F. Supp. 1125, 1133 (D.D.C., 1989); Maryland v. Munson, 467 U.S. 947, 965-968 (1984); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796-797 (1984); Bowen v. Kendrick, 487 U.S. 589 (1988).

1. Historical Evolution of the At-Will Employment Rule

Prior to the American Revolution, simple relationships existed between "master" and "servant" and the laws which governed or regulated the relationship. With the advent of the Industrial Revolution, however, major changes in the American Work Place altered the basic relationships between "master" and "servant". This change eliminated, for all times, relationships under which employers took responsibility for the "servant's" health and well-being and the presumption that any employment was for a yearly term. The transition which occurred ushered in a new concept, that is, the "freedom of contract". It is the "freedom of contract" theory which significantly influenced the American Civil Courts and the Courts' treatment of employment issues.[5]

The at-will rule was first announced in 1877 by H.G. Wood in his Treatise on the Law of Master and Servant.[6] In his Treatise, Professor Wood labeled the at-will employment rule as the American Rule. Soon thereafter, the American courts seized upon the American Rule as

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[5] See, n.1, infra, cf. H. Perritt, Employee Dismissal Law and Practice 2 (1984), n.4; Note, Employment At-Will-The Implied Contract Limitation in Arizona-Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P. 2d 170 (1984); 16 Ariz. St. L.J. 783, 786 (1985); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1825-26 (1980).

[6] N.1, infra, cf. H. Wood, A Treatise On The Law Of Master and Servant (1877).

the basis for development of employment law.[7] Under the American Rule, any employment not for a definite term was presumed to be "at-will" which means that the relationship between the employer and employee could be terminated at the will of either the employer or the employee. Under the doctrine, employers were, and have been, allowed to discharge their employees at any time – for good reason, bad reason, or for no reason at all.[8]

During the past quarter of a century, however, the widespread criticism of the at-will rule and its harsh effects upon employees became well pronounced.

Since adoption of the American Rule, i.e., the at-will employment rule, rather than enact legislation to correct the abuses under the at-will employment rule, at least thirty-three (33) states and the District of Columbia, have carved out narrowly defined exceptions to the at-will rule.[9] These states, unlike the State of Montana, which has enacted a Wrongful Discharge from Employment Act, Mont. Code Ann. Sec. 39-2-902 to 914 (1987), have carved exceptions by theorizing contract doctrines, promissory estoppel; Breach of Covenants of good faith and fair

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[7] N.6, cf. Committee Reports: At-Will Employment and the Problem of Unjust Dismissal, 36 Record Of The Ass'n Of The Bar Of The City of New York 170, 172 (1981); Summers, Individual Protection Against Unjust Dismissal: Time For a Statute, 62 Va. L. Rev. 481, 485 (1976).

[8] N.1, infra n.19, Payne v. Western & Atl. R.R.Co. 81 Tenn. 507, 519-20 1(1884); overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

[9] Note 1, citing numerous authorities in n.76, pp. 208-209 [citations omitted]

dealings, and retaliatory discharges in Whistle Blowing Cases and refusal to violate a public policy.

2. The District of Columbia "at-will" Employment Rule

The courts in the District of Columbia have held steadfast in perpetuating the "at-will" employment rule, notwithstanding the narrow exception to the rule carved by that court. The rule in the District of Columbia represents settled law that an employment contract which does not specify a particular term of employment is an at-will employment contract. As such, the employer can discharge an employee at any time, for any reason, or for no reason at all. Wemhoff v. Investors Management Corp. of America, 528 A. 2d 1205, 1208 (D.C. App. 1987); Taylor v. Greenway Restaurant, Inc., 173 A. 2d 211 (D.C. App. 1961). The narrow exception to the general rule in the District of Columbia is that only employees who are discharged for refusal to violate a specific statute or regulation where those acts, if done, would violate the public policy of the District of Columbia, have standing to challenge an at-will employment discharge. Adams v. George W. Cochran & Co., 597 A. 2d 28, 32 (D.C. App. 1991). The Court refused to abandon the at-will rule, and the narrow exception, in Petitioners' case as well. [Appendix A-1].

The perpetuation of the employment "at-will" doctrine constitute a violation of Article I, Section 10, U.S. Const. which prohibits State impairment of Obligations under Contracts. Moreover, the perpetuation of the

employment "at-will" doctrine denies well over eighty-three million [now subject to "at-will" employment contracts] equal protection of the laws when compared with that small class of union members who are protected under collective bargaining agreements, in violation of the 14th Amendment of the U.S. Constitution. The privilege to enjoy job security is likewise lost and has always been at-risk.

The conclusion is undisputed that Civil Courts exercise State Authority in the shape of laws, customs, or judicial or executive proceedings in adjudicating at-will employment cases. This exercise, in and of itself, constitutes the type of "state action" which is the predicate to Article I, Section 10, and 14th Amendment protection guaranteed under the United States Constitution. Civil Rights Cases, supra. Indeed, the adjudicatory process places courts in the status of "joint venturers" or in a "symbiotic relationship" for purposes of finding "state action".

(III)

A PETITION FOR CERTIORARI SHOULD BE GRANTED TO DECIDE AN IMPORTANT QUESTION DEALING WITH WIDESPREAD FINANCIAL ABUSES, SELF-DEALINGS AND FRAUD BY RELIGIOUS INSTITUTIONS HIDING BEHIND THE VEILED PROTECTION OF THE FIRST AMENDMENT

SUMMARY OF POINTS

1. Petitioners are Religious Consumers and, as such, are entitled to constitutional protection under the due process clause of the Fourteenth Amendment, U.S. Constitution.

2. Petitioners, as Religious Consumers, are Beneficiaries under a Testamentary Trust, as are all other members of the Bible Way Congregation. [Appendix 3]

3. The Bible Way Church is, in fact, a closely-held family corporation and is operated as such.

4. By continuous violation of Federal and District of Columbia Tax Laws, the tax exemption normally allowed, was lost.

5. As a closely-held family corporation, having hand-picked Trustees, numerous acts of fraud and concealment of material financial facts were not disclosed to Petitioners.

6. The Court below misconstrued and misapprehended the creation of a Testamentary Trust under the Last Will and Testament of the Testator. [Appendix 3].

7. The Court below erred in denying Class Action Certification pursuant to the request for Declaratory Judgment.

SUMMARY OF OPERATIVE FACTS

The Respondent, The Bible Way Church, was founded by Bishop Smallwood Williams, now deceased. The church was incorporated under the laws of the District of Columbia in 1936. From the date of incorporation, the Respondent has enjoyed a tax exempt status.

The Trustees were hand-picked, not voted on by the Members of the Bible Way Congregation. Their loyalty was owed to Bishop Smallwood Williams, now deceased.

The Trustees, nor the Church, have never issued a yearly annual report of financial operations, to the Petitioners and the Membership of the church.

The Trustees, invested many millions of dollars in business ventures, received substantial income, and funds were diverted from church coffers.

On March 18, 1991, several years before his death, Bishop Smallwood Williams executed a Last Will and Testament. [Appendix 3]. Under the terms of the instrument, Petitioners contended that the Testator/Settler created a Testamentary Trust under which they were named Ultimate Beneficiaries. [Appendix 3, para. FIFTH]. Pursuant to the terms of the Last Will and Testament, the Chairperson of the Board of Trustees, self appointed, was designated to fulfill several roles, or positions, namely: (a) as Executrix of the Estate; (b) As Beneficiary of the

Estate; (c) as Personal Representative of the Estate; (d) as Trustees under the terms of a Testamentary Trust [APPENDIX 3, para. FIFTH]; and (e) as Residuary Legatee and Devisee.

The Trial Court denied Petitioners' Complaint and Motions for the following relief: (a) Grant of Class Action Certification pursuant to Rule 23, S.C.Civ.R., and (b) Dismissed Petitioners' request for a Declaratory Judgment construing the terms of the Last Will and Testament in question.

The Declaratory Judgment Act, 28 U.S.C. 2201, provides as follows:

> "In a case of actual controversy within its jurisdiction. . . . any courts if the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. . . . "

The District of Columbia, pursuant to Rule 57, Superior Court Civil Rules of Procedure, adopted the Federal Declaratory Judgment Act, supra, hic verba.

A. PETITIONERS AS "RELIGIOUS CONSUMERS"

Petitioners, as are all other members of religious organizations, or churches, are "Religious Consumers"[10]

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[10] The phrase "religious consumer" is a term set forth in a Statement made by The Fundamentalist Anonymous Legal Task

of a "product", which is sold and symbolized under the broad classification of faith, doctrine, discipline, internal organization, ecclesiastical rules, customs and laws. Serbian Eastern Orthodox Diocese v. Milivojevich, supra, 426 U.S. at 713.

B. AS A RELIGIOUS ORGANIZATION, THE BIBLE WAY CHURCH WAS GRANTED A TAX EXEMPT STATUS

Bible Way Church, and members of the Board of Trustees operated church business under concepts normally practiced by closely-held private, or family held, corporations. It enjoyed a tax exempt status. As a tax exempt organization, this religious institution cannot be operated for the benefit of private interests, nor for the benefit of the creator of the church, nor for the benefit of family members, nor persons in control, or under the control of each other, directly or indirectly, nor by private interests. See, U.S. Treas. Reg., Sec. 1.501(c), (3)-1 (d) (1)

Force. See, Comments by Donald H. Chase, Esquire, Director of the Steering Committee On Oversight, U.S. House of Representatives, 100th Cong., 1st Sess., Oct. 6, 1987, Hearing on "Federal Tax Rules Applicable to Tax Exempt Organizations Involving Television Ministries". at pp. 15.

That hearing exposed numerous "horror stories" of religious abuses reported by members of the Fundamentalist, ranging from allegations against churches of sexual misconduct, financial misconduct, religious malpractice, fraud, undue influence, and breach of confidentiality. At page 15. Petitioners were prepared to testify as to Bible Way Church's Televangelist Ministries in weekly television programs and weekly radio broadcasts.

(ii). See also, Church of Scientology of California v. Comm'r, 83 T.C. 381, (1984), aff'd, 87-2 U.S.T.C. 9446, 60 A.F.T.R. 2d 87-5386 (9th Cir., 1987).

C. PETITIONERS, AS RELIGIOUS CONSUMERS, HAD STANDING TO PROVE ACTS OF FRAUD BY RELIGIOUS INSTITUTION AND BY THE TRUSTEES OF THAT INSTITUTION

The Respondents engaged in acts and practices among which included using church funds to pay for radio broadcast and television air time; issuing fundraising letters and circulars seeking monetary contributions from members, making false promises to finance church social programs, and many other acts and practices, which were misrepresentations of material facts. The use of funds to pay for or purchase "air time" in connection with television and radio religious programs has been declared by this Court to be acts of fraud for which church officials may be held liable, notwithstanding First Amendment considerations. See Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Schneider v. State, 308 U.S. 147, 164 (1939); United States v. Ballard, 322 U.S. at 95; Van Schaick v. Church of Scientology of California, 535 F. Supp. 1125 (D. Mass., 1982). Indeed, the Ninth Circuit clarified the difference in treatment of broadcast media for First Amendment purposes. Scott v. Rosenberg, 702 F. 2d 1263, 1272 (9th Cir., 1983); F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978). This Court has held that broadcast frequencies are a "public trust" and differences in the characteristics of the broadcast media in First Amendment standards applied to them. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 383, 386-89 (1969);

Buckley v. Valeo, 424 U.S. 1 (1976); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973). This violation, alone, significantly impacted on Bible Way's tax exempt status. Church of Scientology of California v. Comm'r, supra.

D. PETITIONERS HAD STANDING TO SEEK CLASS CERTIFICATION, PURSUANT TO RULE 23, S.C.CIV.R.P. AS MEMBERS OF BIBLE WAY CHURCH AND AS BENEFICIARIES UNDER THE TERMS OF A TESTAMENTARY TRUST

In their Complaint, Petitioners sought Class Certification on a Count for Declaratory Judgment. Declaratory Judgment required the Court to construe the terms, conditions, and the integrity of a Last Will and Testament executed by Bishop Smallwood Williams (deceased). [APPENDIX 3, para. FIFTH] Petitioners contended that the Testator intended to create a Testamentary Trust and, as members of a class of residuary beneficiaries under the trust, they had standing to seek Declaratory relief, pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, and pursuant to Rule 57, S.C.Civ.R.P.

The trial Court denied the Motion for Class Certification upon the stated ground that Rule 23, S.C.Civ.R. provided that such a Motion must be filed within 90 days. But the Court had granted stay of discovery which was designed to target the scope and number of the class. That denial alone, is in conflict with the decisions issued by other jurisdictions on the identical issue.

Rule 23, S.C.Civ.R.P. provides, as follows:

> "Within 90 days after the filing of a complaint in a case sought to be maintained as a class action, the plaintiff shall move for certification under Rule 23 (c)(1) that the case be maintained as a class action."

But the Rule of Numerosity must also be met by proving that the class is so numerous that joinder of all members is impracticable. Rule 23 (a), (1). S.C.Civ.R. Indeed, Petitioners bore the burden of proving that all of the requirement under Rule 23, supra, had been met. See, Yarmolinsky v. Perpetual Am. Fed. Sav. & Loan Ass'n, 451 A. 2d 92 (D.C. App., 1982).

As a general rule, the timeliness of the filing of a class action motion may hinge on different "TURNING POINTS" in different cases, particularly where an Order granting stay of all further discovery has been entered. Federal Courts throughout the Circuits have resolved the question by employing liberal standards. See Riordan v. Smith Barney, 113 F.R.D. 60 (N.D., ILL, 1986); Livesay v. Punta Gorda Isles, Inc., 550 F. 2d 1106 (8th Cir., 1977), rev'd on other grounds sub nom., Cooper & Lybrand v. Livesay, 437 U.S. 463 (1978); Polich v. Burlington No., Inc., 116 F.R.D. 258 (D. Mont., 1987); Brichman v. Tyco Toys, Inc., 722 F. Supp. 1054 (S.D.N.Y., 1989).

QUESTION PRESENTED IN THE CREATION OF A TESTAMENTARY TRUST.

The issue involved in relationship to the execution of a Last Will and Testament which created a Testamentary

Trust is whether or not the Petitioners may, as representative members or a putative class, and as members of a clearly definable class of residuary beneficiaries, under the terms of a Testamentary Trust, seek a Declaratory Order in a Civil Court without violating the Free Exercise and Establishment Clauses of the First Amendment of the Constitution?

Petitioners contend that they were denied due process in seeking a Declaratory Judgment construing the terms of the Will as one having created a Testamentary Trust. As such, Petitioners contend that they were denied due process in the trial court's denial of their Motion for class certification pursuant to Rule 23, S.C.Civ.R.P.

As a general rule, members of a class designated as beneficiaries under a Testamentary Trust may seek declaration of the existence of the Trust and may seek an accounting from the Trustee.

The Court in the District of Columbia has held that under construction of a will creating a testamentary trust, an action may be brought seeking distribution of certain proceeds of the estate income to life beneficiaries of a residuary trust than as principal to be added to the corpus of the trust. American Security & Trust Co. v. Frost, 73 App. D.C., 75, 117 F. 2d 283 (App. D.C., 1940); Cert. den. 312 U.S. 707, 61 S. Ct. 829. Stock dividends, as well as other income from the Trust, must be distributed as corpus of the trust. Gibbons v. Mahon, 136 U.S. 549, 10 S. Ct. 1057; Lanston v. Lanston, 53 App. D.C. 340, 290 F. 2d 315; Proctor v. American Securities & Trust Co., 69 App. D.C. 70, 98 F. 2d 599. To be sure, there is authority

for the view that Trustees have no discretion in the premises in distribution requirements. Winslow v. Baltimore & O. R. Co., 188 U.S. 646, 23 S. Ct. 443; Wilbur v. Almy, 12 How. 180; Ubhoff v. Brandenburg, 26 App. D.C. 3; Colburn v. Grant, 16 App. D.C. 107, affirmed, 181 U.S. 601, 21 S. Ct. 737; 2 Scott on Trusts, Sec. 194; Restatement of Trusts, Sec. 194.

Petitioners, as beneficiaries, possessed the power to seek termination of the trust. See, Restatement, Second, Trusts, Sec. 337; Bogert, Trust and Trustees (2d Ed., 1965) IV Scott, Trusts (3d Ed., 1967), Sec. 337; 46 Yale L. J. 1005 (1937); Note, Bos. U. L. Rev. 274 (1959). The trial court, in denying them those rights, violated Petitioners' right to due process.

CONCLUSION

In view of the foregoing reasons, points and authorities, the writ of certiorari should be granted.

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APPENDIX 1

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 95-CV-311

THE BIBLE WAY CHURCH OF OUR LORD JESUS CHRIST OF THE APOSTOLIC FAITH OF WASHINGTON, D.C., *et al.*,

APPELLANTS,

v.

EDDYEMAE R. BEARDS, *et al.*,

APPELLEES.

No. 95-CV-527

EDDYEMAE R. BEARDS, *et al.*,

APPELLANTS,

v.

JAMES SILVER, *et al.*,

APPELLEES.

Appeals from the Superior Court of the District of Columbia

(Hon. Gregory E. Mize, Trial Judge)

(Argued May 23, 1996 Decided July 24, 1996)

(Filed July 24, 1996)

B. Michael Rauh, with whom *Martin Shulman* was on the brief, for appellants in No. 95-CV-311 and appellees in No. 95-CV-527.

Clement T. Cooper for appellees in No. 95-CV-311 and appellants in No. 95-CV-527.

Before FERREN and KING, *Associate Judges*, and KERN, *Senior Judge*.

FERREN, *Associate Judge*: These consolidated appeals reflect two suits by Eddyemae R. Beards and Julius Beards against The Bible Way Church of Our Lord Jesus Christ of Washington, D.C., its pastor James Silver, and its board of trustees.[1] In the first appeal (No. 95-CV-311), Bible Way contends the trial court erred in refusing to dismiss the complaint's first count charging Bible Way with negligent failure to account for church funds and to issue financial reports to church members.[2] In the second appeal (No. 95-CV-527), the Beardses maintain the trial court erred in dismissing their complaint for (1) breach of contract, (2) harassment, (3) defamation, (4) intentional

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[1] The Beardses named as defendants in both their lawsuits The Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C.; James Silver, pastor of Bible Way Church and a member of its board of trustees; and Yvonne L. Williams, Wendell M. Slade, Jerome Stevens, and Jeanne Marshall, the remaining members of the church's board of trustees. For ease of reference, we refer to the defendants collectively as "Bible Way" and the institutional defendant, The Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C., simply as "Bible Way Church."

[2] The trial court dismissed the second and third counts of the Beards' complaint as well as the Beards' later-filed motion for class certification. The Beardses have not filed a cross-appeal objecting to these rulings. Because of our overall disposition, the denial of class certification is moot. For the reasons stated below in Part II. C., however, we consider the trial court's dismissal of counts two and three.

infliction of emotional distress, (5) tortious interference with an employment contract, and (6) invasion of privacy. In No. 95-CV-311 we reverse, and order dismissal of the negligence claim, and we affirm dismissal of the other two counts. In No. 95-CV-527 we affirm.

I.

Bible Way Church is a tax-exempt religious organization incorporated in the District of Columbia under D.C. Code § 29-901 *et seq.* (1991 Repl.). The church has a congregation of approximately 3,000 members and has been incorporated in the District since Bishop Smallwood E. Williams founded it in 1936. As a qualifying religious organization, the Bible Way Church is not required to file federal or District income-tax returns or annual reports required of corporations in the District.

Eddyemae R. Beards became a member of Bible Way Church on May 13, 1951, and began working as a church volunteer in 1963. In 1979, Bishop Williams, then pastor of the church, hired her to work as a part-time employee. By 1991, Eddyemae Beards worked approximately forty to fifty hours per week for the church. After the death of Bishop Williams on June 28, 1991, James Silver, the church's interim pastor, hired Beards as Financial Secretary of the church to assume responsibility for maintaining records of individual member contributions.

At the time of Beards' appointment as Financial Secretary, the church received its income through tithes imposed on its members and from various church fundraisers. According to the Beards' first-filed complaint,

Eddyemae Beards' relationship with Silver began to deteriorate in January 1992 when she issued a salary check for $15,600 to Wallace Williams, a church elder who had been suspended from the church, and paid related federal and District withholding taxes. According to the Beardses, Silver used the church intercom to tell Eddyemae Beards that she could be charged with embezzlement for issuing the check, and he later subjected her to unspecified daily humiliations, verbal abuses, and defamatory accusations as a result of the incident.

Approximately two years later on December 1, 1993, Silver sent a letter to Beards informing her that "as part of our ongoing administrative reorganization, the Bible Way Church is discontinuing the position of Financial Secretary, effective today." On May 27, 1994, Eddyemae Beards and Julius Beards, her husband, filed suit (No. 95-CV-527) naming Bible Way Church, Pastor James Silver, and each member of the board of trustees as defendants (collectively "Bible Way," *supra* note 1). The complaint stated six contract and tort counts (summarized earlier) arising out of Eddyemae Beards' dismissal. The defendants moved on July 25, 1994, to dismiss the complaint for failure to state a claim upon which relief could be granted.

In the meantime, on June 10, 1994, the Beardses filed a second, three-count suit (No. 95-CV-311) against Bible Way. Count one charged negligence, alleging that Bible Way had violated a duty of care owed to its members – reflected in particular "Standards of Responsible Stewardship" and "Guidelines and Standards for Audits and Certified Public Accounts" – as a result of the following defaults (among others): failing to monitor "funds

received from all sources" for over twenty years; permitting itself to "fall under the complete domination" of the pastor; failing to comply with Social Security and other federal, as well as local, tax laws; failing to separate the church's religious operations from its "purely secular" activities such as a day care center, apartment complex, and supermarket; failing to account for funds turned over to the wife of the founding pastor; failing for over fifteen years to account for the receipts averaging over $150,000 from the annual church banquet; failing to provide annual financial reports to the members based on monthly statements prepared by Eddyemae Beards as Financial Secretary; failing to account for church funds collected from "Annual Rallies" of "all Church Clubs;" failing to account for the "tithes" paid by "more than 3,000 dues paying members" of the church; failing (before Eddyemae Beards became Financial Secretary) "to maintain accurate records of funds received by the Church;" and violating "the normal, acceptable standards of: (a) Responsible Stewardship and (b) Guidelines and Standards for Audits and Certified Public Accountants."

Count two of the complaint alleged that Bishop Williams had created a testamentary trust in his will for the benefit of church members. The Beardses requested an accounting of, and a receiver for, the testamentary assets. Count three reiterated all previous allegations and sought an accounting of all Bible Way Church assets.

On August 4, 1994, Bible Way moved to dismiss count one (negligence) of the second-filed (June 10) complaint on the ground it was absolutely immune from suit and thus that the court lacked subject matter jurisdiction. The defense premised immunity on a proffer that the

claim would entangle the trial court in matters of "internal church governance." Bible Way moved to dismiss count two for failure to state a claim upon which relief could be granted and sought dismissal of count three as duplicative of the other counts.[3] On October 6, 1994, while the defense motion was pending, the Beardses sought class certification of the counts stated in the second-filed complaint, naming as a class all past and present members of the Bible Way Church.

On March 3, 1995, the trial court ruled on the motions pending on the second-filed complaint. The court denied class certification because the Beardses had failed to file the motion within ninety days of filing the complaint, as required by Super. Ct. Civ. R. 33-I (b)(1). The trial court then granted Bible Way's motion to dismiss counts two and three but denied the motion to dismiss the negligence count. The court concluded that this first count could be resolved exclusively by reference to objective, well-established standards of accounting and reporting that would not entangle the court in matters of religion in contravention of the First Amendment. Bible Way filed an

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[3] Bible Way moved to dismiss both counts one and two on the alternative ground that the Beardses had failed to join an indispensable party as required by Super. Ct. Civ. R. 19 (a). Bible Way contended that the estate of Bishop Williams was indispensable to the first count and that his widow, Verna L. Williams, was indispensable to the second count. The court ruled that because Bishop Williams was "at best a joint tortfeasor" as to count one, his estate was not an indispensable party for that claim. As for the second count, the trial court deemed Bible Way's Rule 19 (a) motion moot after dismissing the count for failing to state a claim upon which relief could be granted.

interlocutory appeal of this ruling; the Beardses did not cross-appeal the court's other rulings.

On April 4, 1995, the trial court granted Bible Way's motion to dismiss each count of the Beards' first-filed (May 27, 1994) complaint. The court initially ruled that Eddyemae Beards had been an at-will church employee whose dismissal could not be challenged under the exception to the at-will employment doctrine announced in *Adams v. George W. Cochran & Co.*, 597 A.2d 28 (D.C.1991) (allowing wrongful discharge claim where at-will employee fired for refusing to violate law). The court then dismissed the first and fifth counts alleging, respectively, breach of contract and tortious interference with an employment contract. The court also dismissed count two, ruling that it duplicated the other counts and was based on a non-existent tort ("harassment") in the District of Columbia. Finally, the court ruled that the defamation, intentional infliction of emotional distress, and invasion of privacy counts were barred by the applicable statute of limitations. The Beardses filed a timely notice of appeal.

II.

Appeal No. 95-CV-311

A.

Bible Way contends, on interlocutory appeal, the trial court erred in denying its Rule 12 (b)(1) motion to dismiss for lack of subject matter jurisdiction. Although this court ordinarily reviews only "final orders and judgments" of the Superior Court, *see* D.C. Code § 11-721 (a)(1) (1995

Repl.), we will treat certain interlocutory orders as final and "collateral," and hence appealable, when "they have a final and irreparable effect on important rights of the parties." *United Methodist Church v. White*, 571 A.2d 790, 791-92 (D.C. 1990); *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949) (denial of motion to require plaintiff to post security in stockholder derivative action appealable as final disposition but not ingredient of cause of action); *Jenkins v. Smith*, 535 A.2d 1367, 1367 (D.C. 1987) (en banc) (interlocutory appeal from denial of motion to dismiss on ground of *forum non conveniens* permitted); *Stein v. United States*, 532 A.2d 641, 643 (D.C. 1987) (recognizing collateral order doctrine), *cert. denied*, 485 U.S. 1010 (1988). To qualify for appellate review, such orders "must conclusively determine the undisputed question"; must "resolve an important issue completely separate from the merits of the action"; and be "effectively unreviewable on appeal from a final judgment." *Stein*, 532 A.2d at 643 (quoting *Flanagan v. United States*, 465 U.S. 259, 265 (1984)).

The trial court's denial of Bible Way's Rule 12 (b)(1) motion plainly satisfies the three prerequisites for the "narrow exception to the rule of finality" for appellate review. *White*, 571 A.2d at 792 (appellate jurisdiction to hear interlocutory appeal where trial court denied church's motion to dismiss on grounds of First Amendment immunity). The order (1) has conclusively determined (by rejecting) Bible Way's claim of immunity from suit under the First Amendment's Free Exercise Clause; (2) has resolved a claim of immunity unrelated to the merits of the Beards' negligence claim; and (3) will effectively cause Bible Way to lose its immunity if the case

proceeds to trial. The trial court's order, therefore, is immediately appealable and we proceed to review it.

B.

In support of its Rule 12 (b)(1) motion, Bible Way argues for its immunity from suit, and for the trial court's corresponding lack of subject matter jurisdiction, because resolution of the negligence claim alleging failure to account for, and report, church finances would involve the court in an ecclesiastical dispute – an involvement forbidden by the Free Exercise Clause. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976) (judicial review of church property dispute constitutionally forbidden where substantial danger court would become entangled in essentially religious controversy); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (state legislation affecting which prelate entitled to use church property barred by First Amendment); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (concluding that "the rule of action" governing civil courts should be for legal tribunals to accept decisions of church bodies where "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" are involved).

The trial court ruled, to the contrary, that the claim "does not require the court to delve into religious rules or the church's internal government and policy." The court therefore denied Bible Way's Rule 12 (b)(1) motion, concluding that Bible Way's negligence, if any, could be determined by reference "exclusively [to] objective, well-

established concepts of [accounting and record-keeping]."[4] In so ruling, the court likened the issue to a secular dispute over church property that courts have

[4] The allegedly objective concepts were identified in the Beards' complaint as the "Standards of Responsible Stewardship" and the "Guidelines and Standards for Audits and Certified Public Accountants." The Beardses later supplied the court, in a "Statement of Material Facts Not in Dispute," with excerpts from various accounting handbooks such as: "Audits of Certain Nonprofit Organizations," published by the American Institute of Certified Public Accountants (AICPA); "Accounting Principles and Reporting Practices for Certain Nonprofit Organizations," published by AICPA; "Standards of Responsible Stewardship," published by the Evangelical Council for Financial Accountability; and "Standards for Charitable Solicitations," published by the Council of Better Business Bureaus, Inc.

It is unclear from the record which particular accounting standards, those named in the complaint or those later identified in the "Statement of Material Facts Not in Dispute," the trial court was referring to in its ruling. Where a Rule 12 (b)(1) motion alleges that the lack of jurisdiction is apparent on the face of the complaint, it is regarded as a "facial" attack and the court must treat the allegations in the complaint as true. Where the motion concerns matters outside the complaint, it is a "factual" attack and the court is free to weigh the evidence without any presumptions regarding its truthfulness. *See Matthews v. Automated Bus. Sys. & Servs.*, 558 A.2d 1175, 1179 n.7 (D.C. 1989); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). In contrast with deciding a Rule 12 (b)(6) motion, the trial court, in deciding a Rule 12 (b)(1) motion, may review any evidence submitted by the parties, including affidavits, without converting the motion into a Rule 56 motion for summary judgment. *Matthews*, 558 A.2d at 1179. Thus, the grant of Rule 12 (b)(1) motion based on a "factual" attack is a ruling without prejudice, not a final judgment on the merits. *See Matthews*, at 1179 n.6.

been able to resolve without a First Amendment bar. *See Jones v. Wolf*, 443 U.S. 595, 604 (1979) ("a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 449 (1969) ("there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property can be awarded"); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 32 (D.D.C. 1990) (discussing neutral principles doctrine as applied to church property disputes; refusing to apply doctrine to church membership dispute).

The issue of subject matter jurisdiction is a question of law, and thus we review the denial of the Rule 12 (b)(1) motion *de novo*. *See White*, 571 A.2d at 793 (implicitly adopting *de novo* standard of review to consider denial of church's Rule 12 (b)(1) motion asserting First Amendment immunity); *see also Herbert v. National Academy of Sciences*, 297 U.S. App. D.C. 406, 411, 974 F.2d 192, 197 (1992); *Windfield v. Groen Div., Dover Corp.*, 890 F.2d 764, 766 (5th Cir. 1989).[5]

[5] Because Super. Ct. Civ. R. 12 is identical to its federal counterpart, FED. R. CIV. P. 12, we may look to court decisions interpreting the federal rule as "persuasive authority in interpreting [the local rule]." *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 13 n.3 (D.C. 1981). *See also Wallace v. Warehouse Employees Union No. 730*, 482 A.2d 801, 807 (D.C. 1984) (noting this court construes Superior Court rules in light of corresponding federal rules as long as not contrary to binding precedent).

Because Bible Way Church is a religious institution, we agree with the church that, in filing the complaint against the church and its leaders, the plaintiffs immediately confronted a potential First Amendment bar to the trial court's subject matter jurisdiction. Well-settled case law demonstrates that the Free Exercise Clause precludes civil courts "from adjudicating church fights that require extensive inquiry into matters of 'ecclesiastical cognizance.' " *Burgess*, 734 F. Supp. at 31 (quoting *Serbian Eastern*, 426 U.S. at 708). Rather, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern*, 426 U.S. at 713; *see also Kedroff*, 344 U.S. at 116 n.23 ("the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted before the secular courts as conclusive," (quoting *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929))); 66 Am. Jur. 2d *Religious Societies* § 32, at 784 (2d ed. 1973); 77 C.J.S. *Religious Societies* § 84, at 107 (1994). This is not to say that civil court review of church action is absolutely prohibited; "the church is not above the law." *White*, 571 A.2d at 795. As the trial court therefore recognized, occasions can arise when civil courts are permitted to address church activity without running afoul of the First Amendment. *See, e.g., Jones*, 443 U.S. at 604; *Burgess*, 734 F. Supp. at 32; *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (raising possibility of fraud or collusion exception to church immunity); *Minker v. Baltimore Annual Conference of United Methodist Church*, 282 U.S. App. D.C. 314, 318, 894 F.2d 1354, 1360 (1990) (permitting breach of contract

claim against church defendant). Civil courts, however, must be careful not to violate the First Amendment by agreeing to resolve a controversy which, at its heart, concerns "religious doctrine and practice." *Burgess*, 734 F. Supp. at 31.

The critical issue in deciding Bible Way's Rule 12 (b)(1) motion, therefore, is whether we can conclude from reading the complaint that the Beards' negligence claim falls within the trial court's constitutionally circumscribed, secular jurisdiction over cases involving religious institutions. Central to this inquiry is the Beards' allegation – on which the trial court relied for subject matter jurisdiction – that the negligent accounting and reporting claim can be decided, consistent with the Constitution, by applying the "objective, well-established concepts of [accounting and record-keeping]" that are reflected in the "Standards of Responsible Stewardship" and the "Guidelines and Standards for Audits and Certified Public Accountants" cited in the Beards' complaint. See *supra* note 4. Under this rationale, the court presumably would avoid First Amendment problems because it could judge the church's actions with reference to uniformly applicable, secular criteria that would not involve the court in resolving a dispute with doctrinal implications. *See Jones*, 443 U.S. at 608 (applying principles of property law); *Presbyterian Church*, 393 U.S. at 450 (same); *Minker*, 894 F.2d at 1360 (applying principles of contract law); 77 C.J.S. *Religious Societies* § 85, at 108-109 ("[civil courts] do have jurisdiction as to civil contract and property rights even though such rights are involved in, or arise from, a church controversy").

Theoretically, there are two possible circumstances that would permit a court to apply clear, objective accounting and reporting criteria to church financial practices without implicating church doctrine: (1) if the principles are so universally – and indisputably – applicable to every organized church that they can, indeed must, be taken for granted without need for church action to adopt them; or (2) even if these principles are not automatically applicable to every church, they are applicable in a particular case because the church has in fact adopted them. In either circumstance, the court would not have a role in deciding what principles apply to the church; the court merely would be asked to apply, without ecclesiastical judgment or intrusion, a previously prescribed, authoritative, nondiscretionary – and clear – policy.

In their complaint, the Beardses define the standard of care by referring to "existing standards applicable to Financial Stewardship," to "mandatory financial disclosure practices," to "Standards or Rules of Stewardship which have been in existence since 1979," to "Standards of Responsible Stewardship" and, in one instance, to complementary "Guidelines and Standards for Audits and Certified Public Accountants." Although the trial court apparently saw these variously described standards as reflecting "objective, well-established concepts," the complaint does not say whether these standards universally and indisputably apply to *every* church organization, *i.e.*, whether the leadership of *every* church unquestionably must, as demanded here, account to its members for

all financial income and outgo, unaffected by any doctrinal limitation that might restrict the kind of accountability required. Accordingly, the complaint premises Bible Way's alleged negligence on the applicability of cited "standards" without alleging exactly what the standards are, where they can be found, and, of critical significance, why the proffered standards are the *only* objective criteria that can apply to a church. Absent such concrete allegations coupled with a proffered basis for believing a proposition that seems counter-intuitive for a church institution, we cannot accept the trial court's ruling that says, in effect, the plaintiff's proffered standards inevitably apply. We perceive no sound basis for that conclusion.

Because the complaint does not adequately allege indisputable, universally applicable rules of accounting and financial reporting, the trial court could not have had subject matter jurisdiction unless the church itself had formally adopted the particular standards the Beardses seek to enforce through civil court action.[6] If the church

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[6] Under D.C. Code § 29-904 (1988 Repl.), a religious institution has wide latitude to adopt its own regulations and rules including, presumably, its own accounting and financial reporting practices:

> The trustees or directors shall hold office during the period stated in their certificates, and vacancies in the office of trustee may be filled by election or appointment as above provided, and rules and regulations may be adopted in relation to the management of the estate and the duties of trustees or directors, or for their removal from office, in accordance with the rules or discipline governing the church or denomination to which such society or congregation may belong, not inconsistent with the

has, in fact, adopted clear, objective accounting and reporting standards that eliminate all doctrinal decision-making in their enforcement, then arguably a civil court can apply them – much as a court can resolve secular disputes over church property – because the church itself presumably has obviated all First Amendment concerns. *See Watson*, 13 U.S. (13 Wall.) at 727, 77 C.J.S. *Religious Societies* § 85, at 109 ("courts will only inquire as to what are the rules and decisions of the church and its tribunals without questioning their wisdom or propriety"). If, however, the church has not adopted specific accounting and reporting standards, the court – by having to decide whether particular principles *should* be applied – will inevitably have to exercise discretion over a matter that initially requires ecclesiastical judgment. As Bible Way convincingly points out in its brief, a church's financial regime, including any required reports to members, necessarily reflects an array of decisions about a member's obligation to pledge funds, and about the leaders' corresponding responsibility to account for those funds, that a civil court cannot arbitrate without entangling itself in doctrinal interpretations:

> Accounting is an area riddled with major subjective decisions. When the entity in question is a religious society, those subjective decisions raise questions of internal church governance which are often themselves based on the application of church doctrine. For example:
>
> > –What should be the collection, tithing, or offering practices of the church?

Constitution of the United States and the laws in force in the District.

> –Should the church pursue pledges from – or take any other particular type of action affecting – members who neglect to remit their obligations?
> –What cash management and investment decisions should be made?
> –Who in the church establishes its spending priorities?
> –Should the pastor have one or more discretionary funds?
> –Should there be an audit committee, and if so, should its membership be internal, external, or both, and how many members of each type should there be?
> –Should the church maintain any of its funds as imprest accounts useable only for specified purposes, or should church finances be operated as a general account?
> –In each case, who makes the decision?

Crucial to the trial court's entertainment of the complaint, therefore – in the absence of an explicit allegation that specified accounting standards are universally and indisputably applied to churches – is an allegation that the church, in fact, has adopted the standards a plaintiff seeks to enforce. A mere reference to the existence of published accounting standards, without alleging that they inherently, and thus inevitably, apply – or without saying, alternatively, that the church formally has adopted them – would leave the complaint too fuzzy for the court to be sure it constitutionally can rule. In short, because a complaint challenging church action is not easily cognizable in a civil court, there is a heightened pleading requirement to assure that the defendants will not be unduly burdened. *See Byrd v. Faber,* 565 N.E.2d 584,

589 (Ohio 1991) (dismissing negligent hiring claim against church after applying heightened pleading standard; requiring that operative facts be pled with particularity because of "the myriad [of] First Amendment problems" accompanying such claims); *see also Letica Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702, 706 (E.D. Mich. 1992) (noting courts have required greater specificity in pleading where case implicates conduct *prima facie* protected by First Amendment).

In this case, the complaint does not expressly allege, or even clearly imply, that the church has adopted the accounting standards referenced in the complaint. The complaint says:

> There existed a set of Standards or Rules of Stewardship which have been in existence since 1979. That the Standards of Responsible Stewardship were in existence, and continue in existence, during all times mentioned. That the Standards are the measurement by which conduct of the Defendants must be judged in the pending action.

The complaint then alleges the particular violations summarized earlier that presumably violate the cited standards. For all the reader can tell, the "Standards of Responsible Stewardship" and related "Guidelines and Standards for Audits and Certified Public Accountants" exist altogether outside the Bible Way Church, and the plaintiffs accordingly are asking the court to select and impose them on a church board of trustees that apparently has declined to do so. We therefore cannot be satisfied that the trial court had jurisdiction to hear the claim. Given the heightened pleading required in this context,

we must conclude that the complaint fails to survive the "facial" attack from Bible Way's motion to dismiss under Rule 12 (b)(1). *See supra* note 4 (discussing *Matthews*, 558 A.2d at 1179 n.7).

We recognize that liberal rules of pleading normally protect a plaintiff against dismissal of an ambiguous complaint when it can be said to state a claim if all reasonable inferences are drawn in the plaintiff's favor. *See* Super. Ct. Civ. R. 8 (a) (1996); *Scott v. District of Columbia*, 493 A.2d 319, 323 (D.C. 1985) (under Rule 8 (a) complaint is sufficient as long as it fairly puts defendant on notice of claim); Charles A. Wright & Arthur R. Miller, 5 FEDERAL PRACTICE AND PROCEDURE § 1215, at 136-38 (2d ed 1990) ("objective of [Rule 8 (a)] to avoid technicalities and to require that the pleading discharge the function of giving the opposing party fair notice"). Ordinarily, therefore, one might liberally construe the Beards' complaint to allege a valid basis for applying the standards it cites without involving the court in the exercise of doctrinal discretion. In this kind of case, however, we cannot do so. The possibility of universal, indisputable accounting and reporting criteria for all churches is almost self-evidently contrary to reason, and, alternatively, there is nothing at all in the Beards' complaint to suggest that Bible Way Church adopted the standards that the Beardses say must apply. As *Byrd* and *Letica Corp.* make clear, when the First Amendment casts a shadow over the court's subject matter jurisdiction, the plaintiff is obliged to plead unqualified jurisdictional facts that clearly take the case outside the constitutional bar. There is no justifiable reason to make a church answer a complaint, let alone go through

discovery, unless a plaintiff specifically and unequivocally pleads all facts necessary to establish the court's jurisdiction.

This requirement of particularity is not a foreign idea; it commonly is imposed in other contexts such as alleged fraud, or ineffective assistance of counsel, where fairness to the defendant requires unequivocal, specific allegations signed by the plaintiff, as well as by the attorney, that verify the truth of the charges in detail. *See* Super. Ct. Civ. R. 11; *Ellerbe v. United States*, 545 A.2d 1197, 1198 (D.C.) (requiring particularized statement of facts for ineffective assistance of counsel claims), *cert. denied*, 488 U.S. 868 (1988); Super. Ct. Civ. R. 9 (b) (1996) (requiring "in all averments of fraud of [sic] mistake, the circumstances constituting fraud or mistake shall be stated with particularity"). No less should be required when the Constitution severely circumscribes the court's subject matter jurisdiction over church controversies.

The importance of the heightened pleading requirement is underscored by the fact that, in its defense, Bible Way filed a church officer's uncontested affidavit stating under oath that the church had not adopted the accounting principles on which plaintiffs would have the court rely – a document the court may consider in deciding not merely a "facial" but a "factual" attack under Rule 12 (b)(1). *See Matthews*, 558 A.2d at 1179; *supra* note 4. Indeed, counsel for the Beardses themselves acknowledged at oral argument on appeal that Bible Way had not formally adopted any of the accounting and reporting standards on which plaintiffs rely.

In sum, we conclude it is fatal to the complaint that the Beardses did not specifically plead that the allegedly objective, published accounting and reporting standards referenced in the complaint either are universally and indisputably applicable to all churches, or had been formally adopted by Bible Way Church. The negligence count in No. 95-CV-311, therefore, must be dismissed under Rule 12 (b)(1) for lack of subject matter jurisdiction because of its failure to survive both a "facial" attack and a "factual" attack on the complaint. *Matthews*, 558 A.2d at 1179 n.7.

We are not oblivious or indifferent to the Beards' concern that a church's very failure to adopt accounting and reporting standards effectively protects church leaders against civil court scrutiny that might well occur if the church, acting more responsibly, had adopted objective criteria that a court could apply without intruding on church doctrine. In expressing such concern, however, the Beardses overlook the primacy of church tribunals for deciding such matters, consistent with the First Amendment. *See Serbian Eastern*, 426 U.S. at 713; *Kedroff*, 344 U.S. at 116; *Watson*, 80 U.S. (13 Wall.) at 728-29, 66 AM. JUR. 2D *Religious Societies* § 32, at 783. Absent an effective church tribunal or adoption of standards a civil court can apply without crossing an ecclesiastical line, a church member's only remedy for perceived financial irregularity appears to be cutting one's losses by leaving the membership.

C.

The Beardses also contend the trial court erred in dismissing count two of their second-filed complaint

(alleging creation of a testamentary trust under Bishop Williams' will), in dismissing count three (calling for an accounting), and in dismissing their motion for class certification. The Beardses failed, however, to file a cross-appeal. *See* D.C. App. R. 4 (a)(1) (requiring notice of appeal within thirty days after entry of judgment or order). Normally, when a party fails to file a timely cross-appeal, we apply a well-settled rule of practice: "on an adversary's appeal a party may not challenge or seek to enlarge a judgment to which [the party] did not object." *Stutsman v. Kaiser Found. Health Plan*, 546 A.2d 367, 370 (D.C. 1988); *accord Associated Third Class Mail Users v. United States Postal Serv.*, 213 U.S. App. D.C. 252, 255, 662 F.2d 767, 770 (1980).

Because this rule of practice is not a rule of jurisdiction, however, it "may be dispensed with under appropriate circumstances." *Edwards v. Woods*, 385 A.2d 780, 783 (D.C. 1978) (citing *Langnes v. Green*, 282 U.S. 531, 538 (1931)); *Saul v. Rowan Heating & Air Conditioning, Inc.*, 623 A.2d 619, 620 n.1 (D.C. 1993); *see also* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[5], at 66-67 (1996). Both Bible Way and the Beardses have expressly requested the court to review the testamentary trust and class certification issues and have briefed and argued them before this court. Because we discern no unfair prejudice that would result to either party from appellate review, and because the contentions may be easily disposed of, we are willing to deviate from the normal practice and consider these contentions.

We turn to the first issue. In order to discern creation of a testamentary trust, we look to the language of the will. *See Knupp v. District of Columbia*, 578 A.2d 702, 704

(D.C. 1990) (general rule of construction looks to language of will to determine testator's intent); *Stern v. J. Nichols Produce Co.*, 486 A.2d 84, 88 (D.C. 1984) (examining plain language of document to discern whether trust created); WILLIAM J. BOWE & DOUGLAS H. PARKER, 5 PAGE ON THE LAW OF WILLS § 40.9. at 127-29 (1962). "If the intention to create a trust does not appear from the language used, and if the will may be given effect without the existence of a trust, an intention to create a trust will not be inferred." *Id.* § 40.9, at 128.

According to the Beardses, the Fifth Article of the Bishop's will pertaining to distribution of the residuary estate establishes a testamentary trust. According to that Article:

> All the rest, residue, and remainder of my property, of whatsoever kind and wheresoever situated . . . I give, devise, and bequeath to my beloved spouse, Verna L. Williams, hereinafter referred to as my "Spouse," if my spouse survives me. If my Spouse does not survive me, I give, devise, and bequeath the said residue of my Estate to my daughter, Yvonne L. Williams. If my said daughter predeceases me, I give, devise, and bequeath the said residue of my Estate to the Bible Way Church of our Lord Jesus Christ, with headquarters in Washington, D.C.

This provision falls well short of reflecting any kind of intent to create a testamentary trust. Bishop Williams' intent, clearly evidenced by the language of the will, was to bequeath his residuary estate to his wife, Verna L. Williams, absolutely, if she survived him, otherwise absolutely to Yvonne L. Williams, Bishop Williams' daughter, if his wife predeceased him. Bible Way Church was to

receive the residuary estate only in the event that both women predeceased Bishop Williams, which did not occur.

The Beardses reply that creation of a testamentary trust can be inferred from the will because the will purportedly granted powers to the estate representative normally vested in a trustee. We acknowledge that trusts sometimes can be inferred where the will "imposes duties on [the executor] which cannot be carried into effect in a practicable manner unless the executor is a trustee." WILLIAM J. BOWE & DOUGLAS H. PARKER, 5 PAGE ON THE LAW OF WILLS § 40.9, at 127-28. Bishop Williams' will, however, grants the estate's personal representative, Yvonne L. Williams, only the powers granted by statute to a personal representative in the District of Columbia, including the power to make investments in, sell, manage, and distribute estate property. *See* D.C. Code § 20-741 (1989 Repl.). Where "the powers [imposed on an executor] are those incident to the office of executor, a trust will not be inferred." WILLIAM J. BOWE & DOUGLAS H. PARKER, 5 PAGE ON THE LAW OF WILLS, § 40.9, at 127-28. This court "cannot make a will, nor can it revise the language of the testatrix. Nor may it impute a meaning which is contrary to the expressed intention of the testatrix." *In re McCray's Estate*, 96 F. Supp. 254, 257 (D.D.C. 1951). Accordingly, the trial court properly dismissed count two of the Beards' complaint.

Nor did the trial court err in dismissing count three labelled "Accounting." The court dismissed this count because it duplicated both the allegations made, and the relief sought, in count one (negligent accounting and reporting to church members). Under Super. Ct. Civ. R. 12

(f), a trial court may, on its own initiative at any time, "order stricken from any pleading any . . . *redundant*, impertinent, or scandalous matter." (Emphasis added.)

The Beardses also contend the trial court erred in denying as untimely their motion for class certification. *See* Super. Ct. Civ. R. 23-I (b)(1) (1996) (requiring motion for class certification to be filed within 90 days of filing complaint). Because we reverse as to count one of the complaint and affirm dismissal of counts two and three, we need not consider the denial of the Beards's motion for class certification as untimely; that issue is now moot. *See Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 600 n.20 (D.C. 1994); *In re Plummer*, 608 A.2d 741, 746 n.7 (D.C. 1992).

III.

Appeal No. 95-CV-527

The Beardses contend the trial court erred in dismissing under Super. Ct. Civ. R. 12 (b)(6) their first-filed complaint for failure to state a claim on which relief can be granted. In reviewing a 12 (b)(6) dismissal, we must construe the complaint in the light most favorable to the plaintiff and accept its allegations as true. *See Fraser v. Gottfried*, 636 A.2d 430, 430 (D.C. 1994); *Auto World, Inc. v. District of Columbia*, 627 A.2d 11, 13 (D.C. 1993). Dismissal is warranted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim that would entitle him [or her] to relief." *McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C. 1979) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The Beardses contend, primarily, that the trial court erred in dismissing their claims for breach of contract (count one) and for tortious interference with contract (count five). The court did so because it found nothing in the complaint to indicate that Eddyemae Beards had an employment contract with Bible Way – a necessary prerequisite for breach of contract and tortious interference with contract claims. Viewing the complaint in the light most favorable to the Beardses, we conclude the trial court did not err.

According to the complaint, Eddyemae Beards was hired by Bishop Williams and, later, re-hired by Pastor Silver. The Beardses do not allege that at any time there was a formal contract of employment or any agreement between Bible Way Church and Eddyemae Beards fixing a period of time for her employment. In the District of Columbia, where there is no clear expression of an intent to enter into a contract for a fixed period, we recognize a presumption that "the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party." *Sullivan v. Heritage Foundation*, 399 A.2d 856, 860 (D.C. 1979) (quoting *Littell v. Evening Star Newspaper Co.*, 73 U.S. App. D.C. 409, 410, 120 F.2d 36, 37 (1941)); *see Simard v. Resolution Trust Corp.*, 639 A.2d 540, 551 (D.C. 1994); RESTATEMENT (SECOND) OF AGENCY § 442 (1958).

The Beardses failed to cite in the complaint any facts which, if taken as true, would rebut the presumption of at-will employment. *See Sullivan*, 399 A.2d at 860 (presumption rebuttable by circumstantial evidence that parties intended employment for fixed period). The Beardses stated in their complaint that Eddyemae Beards intended

to work until she was seventy and that there was a "tacit agreement" that she would work for the church as long as she desired. Even assuming such an agreement, that would not suffice to rebut the at-will presumption. *See id.* (even speaking in terms of "permanent" employment does not rebut at-will presumption where no fixed period of employment); *Littell v. Evening Star Newspaper Co.*, 73 U.S. App. D.C. 409, 411, 120 F.2d 36, 38 (1941) (same). Accordingly, there was no basis for either a breach of contract or a tortious interference with contract claim, and thus both counts one and five were properly dismissed. *See Wemhoff v. Investors Management Corp.*, 528 A.2d 1205, 1208 n.3 (D.C. 1987) (at-will employee can be fired for any or no reason).[7]

The Beardses further contend, however, that even if Eddyemae Beards was an at-will employee, the trial court erred in concluding that the complaint did not fit within the tort of wrongful discharge recognized in *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991). In *Adams*, this court cited public policy to craft a "very narrow exception" to the at-will employment doctrine. In order to qualify under that exception, an employee must show that "the sole reason for [his or her] discharge is the

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[7] The trial court also found no basis for a promissory estoppel claim. After assuming, without any proffered evidence, that Bible Way Church had promised to employ Eddyemae Beards for as long as she desired, the trial court found nothing to indicate that she had relied on such a promise. *See Bender v. Design Store Corp.*, 404 A.2d 194, 196 (D.C. 1979) (promissory estoppel requires evidence of promise, promise must reasonably induce reliance upon it, and promise must be relied on to detriment of promisee).

employee's refusal to violate the law as expressed in a statute or municipal regulation." *Id.*

Although the complaint did not expressly allege a wrongful discharge claim, the trial court construed the complaint liberally to include such a claim on the ground that plaintiffs had "suggest[ed] that defendants wrongfully fired Eddyemae Beards in retaliation for her alleged compliance with the Internal Revenue Code." The Beards' complaint alleges that, as the church's Financial Secretary, Eddyemae Beard issued a $15,600 salary check pursuant to "certain Federal and District of Columbia Tax Regulations," an act that led to a decline in her relationship with Pastor Silver. Besides merely asserting in a conclusory fashion that issuance of the check was required by unspecified tax laws, the complaint supplies no basis for finding that this was the reason for her dismissal nearly two years later. As currently pleaded, the complaint sets forth facts showing only that Eddyemae Beards' unauthorized issuance of the check was later subject to Pastor Silver's disapproval and reprimand. The facts as alleged, moreover, suggest that Eddyemae Beards' dismissal by the church's five-member board of trustees in December 1993 was the result of an administrative reorganization taking place in the church and was not related to her earlier issuance of the check. The complaint, therefore, failed to set forth a sufficient basis for a wrongful discharge based on *Adams*. There was no clear allegation, or proffered evidence, of discharge based on refusal to violate the law, *see Adams*, 597 A.2d at 34; nor was there any other allegation, or proffered evidence, that

conceivably could state a claim on some other public policy ground this court might recognize.[8]

As for the remaining counts, two, three, four, and six, the Beardses have not argued on appeal that the trial court erred in dismissing their claims, respectively, for harassment, defamation, intentional infliction or emotional distress, and invasion of privacy. "This court is not duty bound to resolve an issue of law that the parties do not contest." *Mims v. Mims*, 635 A.2d 320, 329 (D.C. 1993) (omitting citations). Because they have not been contested, we therefore deem the issues waived and affirm the dismissals. *See id.; Giordano v. Interdonato*, 586 A.2d 714, 719 n.9 (D.C. 1991).

* * *

In No. 95-CV-311 we reverse the trial court's denial of Bible Way's motion to dismiss count one (negligence) count but affirm the dismissal of counts two and three. We affirm dismissal of the complaint in Appeal No. 95-CV-527.

So ordered.

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[8] *See Carl v. Children's Hospital*, 657 A.2d 286 (D.C.), *vacated and reh'g granted*, 665 A.2d 650 (D.C. 1995) (per curiam), No. 93-CV-1476 argued en banc Oct. 12, 1995 (pending decision). In *Carl*, this court has under advisement the question whether the public policy exception in *Adams* should be expanded to include the discharge of an at-will employee nurse who allegedly was dismissed after testifying at a public hearing as an expert against proposed tort reform legislation supported by her hospital employer and also providing expert testimony in medical malpractice litigation. No allegations or proffered evidence in the instant complaint can be construed to state a claim that goes beyond the *Adams* exception; thus, there is no reason to hold this case pending resolution of *Carl*.

APPENDIX 2

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 95-CV-311

BIBLE WAY CHURCH OF OUR LORD JESUS CHRIST, ET AL.,

Appellants,

v. CA6580-94

EDDYEMAE R. BEARDS, ET AL.,

Appellees.

No. 95-CV-527

EDDYEMAE R. BEARDS, ET AL.,

Appellants,

v. CA6049-94

JAMES SILVER, ET AL.,

Appellees.

BEFORE: Wagner, Chief Judge; *Ferren, Terry, Steadman, Schwelb, Farrell, *King, Ruiz, and **Reid, Associate Judges; *Kern, Senior Judge.

ORDER

(Filed Oct. 30, 1996)

On consideration of the motion of appellees in no. 95-CV-311 and appellants in no. 95-CV-527 for leave to file petition for rehearing or rehearing en banc, the opposition thereto, and the lodged petition, it is

ORDERED that the motion for leave to file is granted and the Clerk is directed to file the lodged petition. It is

FURTHER ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Associates Judge Reid has recused herself from these cases.

Copies to:

Honorable Gregory E. Mize

Clerk, Superior Court

B. Michael Rauh, Esquire
1501 M Street, NW
Suite 700
Washington, DC 20005-1702

Clement T. Cooper, Esquire
P O Box 76135
Washington, DC 20013-6135

APPENDIX 3

LAST WILL AND TESTAMENT OF SMALLWOOD E. WILLIAMS

I, Smallwood E. Williams, of Washington, D.C., do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all Wills and Codicils thereto at any time heretofore made by me.

FIRST: I direct my Personal Representative to arrange for my burial and monument at Lincoln Memorial Cemetery, Washington, D.C., without regard to any limitation on the cost thereof under local law, although I do request a simple burial and that no vault need be constructed. I further direct my Personal Representative to pay first out of my general estate all of my just debts; all expenses of administration of my Estate; and the expenses of my last illness.

SECOND: If any person named in this Will and I shall die under such circumstances that the order of our deaths cannot be determined by clear and convincing proof, such person shall be conclusively presumed to have predeceased me, and all provisions of this my Last Will and Testament shall be construed upon that presumption.

THIRD: I direct my Personal Representative to pay out of my general estate all estate, inheritance, succession, or any other similar taxes, if any, and any interest or penalties thereon, attributable to my taxable estate.

FOURTH: (A) I give and bequeath to each of my two grandchildren presently living, to wit, Yvonne Jones Pettice and William Virgil Jones, Jr., if they survive me,

the sum of Five Thousand Dollars ($5,000) each, in cash and/or property, as my Personal Representative shall determine. If only one of my said grandchildren shall survive me, there shall be only one $5,000 bequest hereunder.

(B) I give and bequeath to each of my two great-grandchildren presently living, to wit, William Virgil Jones, III, and Christopher Jude Pettice, if they survive me, the sum of One Thousand Dollars ($1,000) each, in cash and/or property, as my Personal Representative shall determine. If only one of my said great-grandchildren shall survive me, there shall be only one $1,000 bequest hereunder. If at the time of distribution hereunder, either of the distributees is a minor, I direct that the receipt signed by a parent of said minor designated by my Personal Representative, as a custodian under the uniform gift to minors act or similar law, shall be a full acquittance and discharge of my Personal Representative with respect thereto, and under no circumstances shall the special appointment of a guardian or custodian for the bequest be required.

(C) I give and bequeath to my daughter, Yvonne L. Williams, if she survives me, the sum of One Hundred Thousand Dollars ($100,000), in cash and/or property, as my Personal Representative shall determine.

(D) I give and bequeath to my son, Wallace W. Williams, if he survives me, my Rolex wristwatch and the sum of Ten Thousand Dollars ($10,000), in cash and/or property, as my Personal Representative shall determine. I have made no other provision for my son in this Will,

knowing that I have made adequate financial provision for him during my lifetime.

(E) I give and bequeath to my sister, Corine Gibson, if she survives me, the sum of Two Thousand Dollars ($2,000), in cash and/or property, as my Personal Representative shall determine.

(F) I give and bequeath to my brother, Adolphus Williams, if he survives me, and to each of my sisters, Lucille Turner, Bobbette Morrow, Mary Willie Handon, and Lucretia McDaniels Cunningham, if they survive me, the sum of One Thousand Dollars ($1,000) each, in cash and/or property, as my Personal Representative shall determine. If any of my said siblings predeceases me, the bequest to him/her hereunder shall be completely inoperative.

(G) I give and bequeath to the devoted secretary of the Bible Way Church, Dianne Jackson, the sum of Five Hundred Dollars ($500), if she survives me.

(H) I give and bequeath to Mrs. Arthurene Foxx, the devoted secretary of the Board of Bishops of the Bible Way Church, the sum of Five Thousand Dollars ($5,000), in cash and/or property, as my Personal Representative shall determine, if the said Arthurene Foxx survives me.

(I) I give and bequeath to Mrs. Sadie Woodard, my good friend and lifelong member of the Bible Way Church, the sum of Five Hundred Dollars ($500), if she survives me.

(J) I give and bequeath to Mrs. Eddye Mae Beards, the devoted financial secretary of the Bible Way

Church, the sum of One Thousand Dollars ($1,000), if she survives me.

(K) I give and bequeath to my good friend, Deacon Julius Beards, if he survives me, the sum of One Thousand Dollars ($1,000).

(L) I give and bequeath to Elder Lawrence Thomas, a lifelong member of the Bible Way Church, the sum of Five Hundred Dollars ($500), if he survives me.

(M) I give and bequeath to my good friend, Emmanuel Harris, if he survives me, my nickel-plated .25 calibre automatic pistol, in recognition of his many years of service as a Deputy United States Marshal.

(N) I give and bequeath to my good friend, Lt. Lowell Duckett, if he survives me, my .38 calibre Colt Police Special pistol.

(O) I give and bequeath to my good friend, Deacon Simon Noble, if he survives me, currently Chairman of the Deacon Board of the Bible Way Church, my 12-gauge shotgun.

(P) I give and bequeath to my good friend, Deacon Johnnie Belton, if he survives me, a Deacon of the Bible Way Church, my 16-gauge shotgun.

(Q) The cost of re-registering any of the firearms mentioned hereinabove which require such re-registration shall be borne as an expense of the administration of my Estate.

(R) Any bequest in this Article which is conditioned upon the beneficiary's surviving me shall pass

instead as part of my Residuary Estate if the beneficiary predeceases me.

FIFTH: All the rest, residue, and remainder of my property, of whatsoever kind and wheresoever situated, including any lapsed legacies to which I may be entitled and any property over which I may have any power of appointment, which I exercise by this specific reference, and including any claims or entitlements which I may have at the time of my death for salary or similar compensation not taken or unpaid by The Bible Way Church of Our Lord Jesus Christ, with headquarters in Washington, D.C., or loans by me to said church, I give, devise, and bequeath to my beloved spouse, Verna L. Williams, hereinafter referred to as my "Spouse" if my Spouse survives me. If my Spouse does not survive me, I give, devise, and bequeath the said residue of my Estate to my daughter, Yvonne L. Williams. If my said daughter predeceases me, I give, devise, and bequeath the said residue of my Estate to the Bible Way Church of our Lord Jesus Christ, with headquarters in Washington, D.C.

SIXTH: No interest of any beneficiary in the corpus or income of my Estate shall be subject to assignment, anticipation, alienation, pledge, attachment, or claims of creditors of such beneficiary, nor may otherwise be voluntarily or involuntarily alienated or encumbered by such beneficiary.

SEVENTH: In extension and not in limitation of the powers given by law or other provisions of this Will, my Personal Representative shall have the following powers with respect to the settlement of my Estate, in each case

to be exercised from time to time in the discretion of my Personal Representative without order or license of court:

A. To retain any investment, and to reinvest in stocks, shares, and obligations of corporations, or unincorporated associations or trusts, of investment companies, or in a common trust fund, or in any other kind of personal or real property;

B. To sell and to make contracts concerning real or personal property for such considerations as my Personal Representative may determine; and to execute deeds, transfers, and other instruments of any kind;

C. To hold bonds, shares, or other securities in bearer form, or in the name of the Personal Representative, or in the name of a nominee, without any indication of any fiduciary capacity;

D. To give general or special proxies or powers of attorney for voting or acting in respect of shares or securities, which may be discretionary and with power of substitution; to deposit shares or securities with or transfer them to protective committees or similar bodies; to join in any reorganization and to pay assessments or subscriptions called for in connection with shares or securities held;

E. To improve or develop real estate; to construct, alter, or repair buildings or structures on real estate; to settle boundary lines and easements and other rights with respect to real estate; to partition and to join with co-owners and others in dealing with real estate in any way;

F. To employ investment counsel, custodians of Estate property, brokers, agents, accountants, and attorneys;

G. Generally to determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain and any charge, disbursement, or loss as is deemed advisable in the circumstances of each case as it arises, notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the courts;

H. To keep any or all of the Estate property at any place or places in the District of Columbia or elsewhere within the United States or with a depository or custodian at such place or places.

EIGHTH: The following provisions are applicable to each of the Articles in this Will to the extent that they are not inconsistent with any of the provisions of such Articles.

A. When required to make a distribution or transfer of all or a part of the assets of my Estate, my Personal Representative may retain therefrom assets sufficient in my Personal Representative's judgment to cover any liability which may then or later be imposed, including but not limited to any liability for estate, income, or other taxes, until such liability shall have been finally determined.

B. Whenever my Personal Representative shall have the right to elect (1) whether any item of expense connected with the administration of my Estate shall be

claimed instead as a deduction for federal income tax purposes, or (2) to value my gross estate as of an alternate valuation date, my Personal Representative is authorized to exercise any such right of election in such manner as my Personal Representative determines to be advisable, even though the manner in which any such election is exercised may result in an advantage or disadvantage to any beneficiary or beneficiaries hereunder as compared with any other beneficiary or beneficiaries hereunder.

C. Any power or right granted to my Personal Representative may be exercised without posting any bond, without obtaining any order from or the approval of any court, and without any notice to or consent of anyone.

NINTH: A. I appoint my daughter, the aforesaid Yvonne L. Williams, as Personal Representative of this, my Last Will and Testament. If she cannot or does not qualify, or cannot or does not continue to carry out the duties of that office, I name my granddaughter, Yvonne Jones Pettice. I direct that no bond or undertaking shall be required of any Personal Representative named herein, either in this or in any other jurisdiction wherein my Personal Representative may deem it necessary or advisable to qualify, and that if, notwithstanding this direction, any bond is required by law, statute, or rule of court, no sureties be required thereon.

B. No one dealing with my Personal Representative need inquire concerning the validity of anything that my Personal Representative purports to do or need to see to the application of any money paid or any property transferred to or upon my Personal Representative's order.

C. My Personal Representative shall be responsible only for my Personal Representative's own acts and omission in bad faith.

IN WITNESS WHEREOF, I have hereunto set my signature and seal this 18th day of March, 1991.

/s/ Smallwood E. Williams (SEAL)
Smallwood E. Williams

This instrument, consisting of eight (8) typewritten pages, was signed, sealed, published, and declared by Smallwood E. Williams, to be the testator's Last Will and Testament in the presence of us, and we, at the testator's request, in the testator's presence, and in the presence of each other, have hereunto subscribed our names as witnesses this 18th day of March, 1991, and each of us declares that in his or her opinion, the said testator is of sound and disposing mind and memory, and aware of what the testator was doing.

/s/ Andrée T. Fouant ✔ residing at 3500 Washington Drive
Signature

Andrée T. Fouant — Falls Church, VA 2200?
Printed

/s/ Grace L. Wood ✔ residing at 4501 Conn. Ave NW
Signature

Grace L. Wood — Washington, D.C. 20008
Printed

/s/ Teresa A. Gandy ✔ residing at 1900 Nowak Road
Signature

Teresa A. Gandy — Silver Spring, MD ?????
Printed

The UNITED METHODIST CHURCH, BALTIMORE ANNUAL CONFERENCE, Appellant,

v.

John R. WHITE, Appellee.

No. 88-1100.

District of Columbia Court of Appeals.

Argued Oct. 2, 1989.

Decided March 5, 1990.

Former Methodist minister filed suit for breach of employment contract. The Superior Court, Stephen F. Eilperin, J., denied church's motion to dismiss complaint on constitutional grounds and for reconsideration. On appeal, the Court of Appeals, Rogers, Chief Judge, held that: (1) order denying dismissal motion was immediately appealable as collateral order; (2) church was immune from defending its decision to terminate minister; and (3) minister's claim that he was denied benefits to which he was entitled pursuant to employment contract was not clearly separate from his ecclesiastical claims.

Reversed and remanded.

Thomas E. Starnes, with whom Thomas R. Kline, Washington, D.C. was on brief, for appellant.

Clement Theodore Cooper, Washington, D.C. for appellee.

Before ROGERS, Chief Judge, and FERREN and BELSON, Associate Judges.

ROGERS, Chief Judge:

Appellant United Methodist Church, Baltimore Annual Conference (UMC) appeals from denials of its motions to dismiss the complaint and for reconsideration on the ground that the Free Exercise and Establishment Clauses of the First Amendment of the Constitution preclude civil courts from adjudicating religious disputes involving the qualifications or fitness of clergy. Appellee John R. White alleged that he was wrongfully discharged as a minister in the United Methodist Church, Baltimore Annual Conference and sought his reinstatement in addition to compensatory and punitive damages for alleged breaches of his employment contract. We reverse.

I

John R. White was an ordained minister in the United Methodist Church, Baltimore Annual Conference.[1] He served as pastor at a number of United Methodist churches from 1970-85, and as a chaplain in the United States Air Force. In October 1984 he became severely depressed and emotionally disturbed. He was hospitalized for several months in the psychiatric ward at George Washington University Medical Center. On November 13, 1984, the Executive Committee of the

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[1] The United Methodist Church is composed of numerous annual conferences. Each conference covers a particular geographic jurisdiction and meets annually. The Baltimore Annual Conference covers Washington, D.C., most of Maryland and part of West Virginia. A General Conference, composed of ministers and lay members, meets every four years to discuss and pass legislation on issues of concern to United Methodists.

Board of Ministry voted to place Rev. White on a leave of absence pursuant to ¶ 450.1 of *The Book of Discipline of the United Methodist Church, (Discipline)*. In addition, pursuant to the requirements of the *Discipline* that a minister on leave of absence may not exercise his ministry beyond the confines of his local church and that his ecclesiastical endorsement must be withdrawn, the Division of Chaplains and Related Ministries, the General Board of Higher Education,[2] and the Ministry of the United Methodist Church sent a letter on September 16, 1985, to the Air Force withdrawing Rev. White's ecclesiastical endorsement.

A year and one half later, on May 13, 1987, the Baltimore Conference Board of Ministry recommended that Rev. White's conference membership be terminated. In accordance with the *Discipline*, ¶ 455.1(f), Rev. White was sent notice of the Board of Ministry's action by letter dated May 14, 1987. The contents of the letter were read to him on June 3, 1987. Eight days later, his counsel wrote to the Chairman of the Conference Relations Committee advising that he had "reviewed, in detail, the applicable provision of the Book of Discipline." Although Rev. White had only ten days after receiving notice of the termination of his conference membership to request a church trial, counsel did not request a church trial.

Rev. White's ministerial membership in the Baltimore Conference was terminated on June 9, 1987, pursuant to a vote of the Ministerial Executive Session of the 1987

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[2] The General Board of Higher Education is a Tennessee corporation that is not under the auspices or control of the Baltimore Annual Conference.

Annual Conference due to "disobedience to the Order and Discipline of the United Methodist Church." On June 24, 1987, through counsel, he requested a church trial which was denied as untimely.

On March 28, 1988, Rev. White sued UMC for breach of contract seeking reinstatement of his ecclesiastical endorsement, a letter of apology, and compensatory and punitive damages. He also sought a declaration that he had exhausted his administrative remedies and demanded a jury trial. His complaint alleged that he was wrongfully discharged and divested of his ecclesiastical endorsement, denied related hospital and retirement benefits and compensation, and otherwise injured. UMC filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The motion was denied on May 20, 1988. On June 6, 1988, UMC filed a motion for reconsideration or for allowance of an immediate appeal, which was also denied on July 20, 1988. UMC filed a notice of appeal on August 20, 1988.[3] Rev. White then

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[3] Rev. White contends that UMC's appeal was untimely and should have been filed, pursuant to D.C.Code § 11-721(d) and D.C.App.R. 5(a), within 10 days of the trial judge's denial of the motion for reconsideration and allowance of an immediate appeal. These provisions apply only when the trial judge grants a request to certify an interlocutory appeal. D.C.Code § 11-721(d); D.C.App.R. 5(a).

UMC filed its appeal as a matter of right from the trial judge's decisions pursuant to D.C.Code § 11-721(a) and D.C.App.R. 4. Under Rule 4(a)(2), the timely filing of a motion to alter or amend judgment has the effect of tolling the thirty-day period for filing an appeal. The May 20, 1988, order (docketed May 24, 1988) was mailed to the parties. *See*

filed a motion to dismiss the appeal on the ground that the order appealed from was not a final order. This court initially dismissed the appeal for lack of jurisdiction, but subsequently granted UMC's petition for rehearing.

II

Jurisdiction. Under D.C.Code § 11-721(a)(1) (1988), this court has jurisdiction to review all "final orders and judgments" of the Superior Court. In addition, appeals from certain interlocutory orders are permitted where they have a final and irreparable effect on important rights of the parties.[4] *See Stein v. United States,* 532 A.2d 641, 643 (D.C.1987) (citing *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)). *See also Jenkins v. Smith,* 535 A.2d 1367 (D.C.1987)

Super.Ct.Civ.R. 6(e) (3 additional days). Hence, the motion for reconsideration was timely filed on June 6, 1988, and the time to appeal was tolled. The trial judge denied UMC's motion for reconsideration on July 20, 1988, and the appeal, filed on August 20, 1988, was timely.

[4] Appellee contends that court orders, not otherwise final, are interlocutory and therefore not appealable. However, the cases on which he relies are distinguishable and support the proposition stated by appellant. *Mills v. Cosmopolitan Ins. Agency,* 442 A.2d 151 (1982) (appeal from denial of costs for appeal premature, not a final order); *but see McQueen v. Blacknall,* 547 A.2d 172, 175 (D.C.1988) (en banc) (protective order in landlord and tenant cases is an appealable interlocutory order); *Crown Oil and Wax Co. of Delaware v. Safeco Ins. Co. of Am.,* 429 A.2d 1376 (1981) (appeal from denial of motion to dismiss for *forum non conveniens* granted); *Jenkins v. Parker,* 428 A.2d 367 (1981) (denial of motion to quash an attachment is not an appealable order unless it changed or affected the possession of property).

(en banc) (affirming *Frost v. People's Drug Store, Inc.*, 327 A.2d 810, 812 (D.C.1974) (interlocutory appeal from denial of motion to dismiss for *forum non conveniens*)). To come within the narrow exception to the rule of finality as a predicate for appellate jurisdiction, there are three prerequisites:

> First, it "must conclusively determine the undisputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must be "effectively unreviewable on appeal from a final judgment."

Stein, supra, 532 A.2d at 643 (quoting *Flanagan v. United States*, 465 U.S. 259, 265, 104 S.Ct. 1051, 1054, 79 L.Ed.2d 288 (1984)). We hold that the denial of UMC's motion to dismiss on grounds of constitutional immunity meets these three tests.

First, the trial judge, by denying UMC's motion to dismiss and motion for reconsideration, has conclusively determined the disputed issue of UMC's claim of immunity from suit in the civil courts.

Second, the very nature of an immunity claim makes it collateral to and separable from the merits of Rev. White's claim of wrongful termination. The issue in this appeal is whether Rev. White's claims fall, as a matter of law, within the scope of UMC's First Amendment immunity. In contending that the First Amendment protects the church from judicial inquiry into Rev. White's suit, UMC does not address the merits of the assertions in Rev. White's complaint against the church. Rather, UMC contests the authority of the civil courts to adjudicate a dispute between UMC and its pastor. Thus, the elements

of UMC's immunity claim are clearly independent of any liability that it may bear for Rev. White's termination. Therefore, the issues raised by the trial judge's denial of UMC's motion to dismiss are collateral to Rev. White's cause of action and will not "affect, or . . . be affected by, decision of the merits of this case." *Cohen v. Beneficial Indus. Loan Corp., supra,* 337 U.S. at 546, 69 S.Ct. at 1225.

Finally, UMC's claim of immunity under the Free Exercise Clause and the Establishment Clause of the First Amendment of the Constitution will be irreparably lost if not adjudicated before trial. Although *Stein* concerned an appeal from denial of a motion to dismiss on grounds of statutory immunity, the Supreme Court has extended the same logic to constitutional immunities and guarantees. *See Mitchell v. Forsyth,* 472 U.S. 511, 525, 105 S.Ct. 2806, 2814, 86 L.Ed.2d 411 (1986) (essence of governmental immunity claim is freedom from legal liability for immunized acts); *Helstoski v. Meanor,* 442 U.S. 500, 508, 99 S.Ct. 2445, 2449, 61 L.Ed.2d 30 (1979) (purpose of Speech & Debate Clause immunity to prevent representative from defending themselves); *Abney v. United States,* 431 U.S. 651, 658-61, 97 S.Ct. 2034, 2039-41, 52 L.Ed.2d 651 (1977) (denial of double jeopardy claim would undermine guarantee not to be tried twice for the same crime).

The First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial under certain circumstances in order to avoid subjecting religious institutions to defending their religious beliefs and practices in a court of law. *See NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 503, 99 S.Ct. 1313, 1320, 59 L.Ed.2d 533 (1979). Obviously, if Rev. White's claims fall within the scope of UMC's immunity,

once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial scrutiny would be irreparably violated. In short, UMC's immunity claim can be exercised, if at all, only before trial, and must be reviewed pretrial or it can never be reviewed at all. *See Mitchell v. Forsyth, supra,* 472 U.S. at 526, 105 S.Ct. at 2815.

Accordingly, we hold that the denial of UMC's motion to dismiss on grounds of constitutional immunity is immediately appealable as a collateral order, and that we have jurisdiction to review it in this pretrial appeal.

III

Immunity. The United States Supreme Court has long held that, generally, civil courts are not a constitutionally permissible forum for review of ecclesiastical disputes. *Serbian Eastern Orthodox Diocese v. Milivojevich (Serbian),* 426 U.S. 696, 710, 96 S.Ct. 2372, 2381, 49 L.Ed.2d 151 (1976); *Presbyterian Church v. Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,* 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952); *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929); *Watson v. Jones,* 80 U.S. (13 Wall.) 666, 20 L.Ed. 485 (1871). There are limited exceptions, as, for example, where an employee has provided a purely secular service for the church, civil courts have extended jurisdiction. *See Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 330-32, 107 S.Ct. 2862, 2865-66, 97 L.Ed.2d 273 (1987) (building engineer possessed no duties remotely related to religious beliefs or duties); *EEOC v.*

Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir.1982) (Civil Rights Act applied to editorial secretary in a church publishing house); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir.1980), *cert. denied*, 453 U.S. 912, 101 S.Ct. 3143, 69 L.Ed.2d 994 (1981) (Civil Rights Act applied to secular employment decisions of religious institution). Also, in extremely limited circumstances, courts have adjudicated conflicts between church and clergy when the issue has been whether church officials had the authority to effect a pastor's discharge, as distinct from whether the church's decision was correct *Vincent v. Raglin*, 114 Mich.App. 242, 318 N.W.2d 629, 631 (1982) (church trustees did not have authority to remove pastor). *See Stony Island Church of Christ v. Stephens*, 54 Ill.App.3d 662, 12 Ill.Dec. 299, 369 N.E.2d 1313 (1977) (elders had authority to terminate pastor's employment); *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 422 N.E.2d 1337 (1981) (court gave effect to decision of congregation); *Holt v. Trone*, 341 Mich. 169, 67 N.W.2d 125 (1954) (elders had no authority to remove pastor because congregation had removed elders); *Tate v. Walker Memorial Baptist Church*, 282 A.D. 675, 122 N.Y.S.2d 182 (1953) (congregation as a whole had authority to expel minister); *Walker Memorial Baptist Church v. Saunders*, 285 N.Y. 462, 35 N.E.2d 42 (1941) (plaintiff had no power to expel minister).

Rev. White does not contend that he was removed from the United Methodist Church, Baltimore Annual Conference by a person without the authority to remove him. Rather, he maintains that he was wrongfully terminated as a result of mistaken judgments by church officials and misapplication or violation of the Discipline,

and that he was wrongfully denied hospital and retirement benefits and compensation during his illness. He seeks judicial evaluation of the basis for the church's decision to terminate him and, ultimately, an order directing reinstatement of ecclesiastical endorsement by the UMC. In addition, he seeks compensation for the benefits which he alleges were promised under the terms of his negotiated employment contract.

Despite civil court adjudication in the limited circumstances noted above, it is well established that a civil court may not interfere in matters of church government, as well as matters of faith and doctrine. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, supra,* 344 U.S. at 116, 73 S.Ct. at 154. Such ecclesiastical decisions are generally beyond the jurisdiction of secular courts. *Rayburn v. General Conf. of Seventh-Day Adventists,* 772 F.2d 1164, 1167 (4th Cir.1985), *cert. denied,* 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986). Indeed, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchial polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Serbian Eastern Orthodox Diocese v. Milivojevich, supra,* 426 U.S. at 713, 96 S.Ct. at 2382.

The right to choose a minister without judicial intervention "underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and the world at large." *Rayburn v. General Conf. of Seventh-Day Adventists, supra,* 772 F.2d at 1167-68. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,*

supra, 344 U.S. at 116, 73 S.Ct. at 154. Any attempt by the civil courts to limit the church's choice of its religious representatives would constitute an impermissible burden on the church's First Amendment rights. *Rayburn v. General Conf. of Seventh-Day Adventists*, supra, 772 F.2d at 1168. *See Kaufmann v. Sheehan*, 707 F.2d 355, 358 (8th Cir.1983). *See also McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir.1972) ("[a]n investigation and review of such matters of church administration and government as a minister's salary, his place of assignment, and his duty, . . . could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the Constitution."). Consequently, courts have concluded that employment disputes concerning the status of pastors are inherently ecclesiastical and cannot constitutionally be subject to review. *See Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C.Cir.1990) (pastor's suit for violation of federal age discrimination statute dismissed); *Rayburn v. General Conf. of Seventh-Day Adventists*, *supra*, 772 F.2d 1164 (minister's claims of race and sex discrimination dismissed); *Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir.1974) (United Methodist minister's suit for wrongful discharge dismissed); *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986) (Methodist minister's common law claims challenging forced retirement by the church dismissed); *Knuth v. Lutheran Church Missouri Synod*, 643 F.Supp. 444 (D.Kan.1986) (discharged pastor's claim of breach of contract and implied duty of good faith and fair dealing, seeking damages for

removal and attempt to regain pastoral status, dismissed); *Hafner v. Lutheran Church-Missouri Synod*, 616 F.Supp. 735 (N.D.Ind.1985) (pastor's suit for alleged denial of benefits based on interpretation of church synod constitution dismissed). Rev. White's complaint for reinstatement and damages resulting from his divestment fall well within those matters protected from secular judicial scrutiny.

The Discipline of the United Methodist Church is a religious document which this court cannot construe without usurping the rights of the UMC to construe its own law. *Knuth v. Lutheran Church Missouri Synod, supra*, 643 F.Supp. at 448. A secular evaluation of procedures that ecclesiastical or canon law requires the church to follow is precisely the type of inquiry the First Amendment prohibits. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 713, 96 S.Ct. at 2382. The grounds for Rev. White's suit are set forth in the Discipline and arise from his claim that the church failed to comply with its own regulations. His brief in this court is replete with religious interpretations, demonstrating the impossibility of resolving his divestment claims without construing church doctrine. Accepting Rev. White's allegations as true for the purposes of this appeal,[5] this court, in order to review the merits of his claims would necessarily become entangled in matters of a highly religious nature, issues at the core of internal church discipline, faith and

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[5] For purposes of ruling on the motion to dismiss, the allegations of his complaint must be taken as true and liberally construed. *McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C.1979).

church organization. *Kaufmann v. Sheehan, supra,* 707 F.2d at 358. Accordingly, we hold that the UMC is immune from defending its decision to terminate Rev. White.

This does not end our consideration, however, for Rev. White alleges that while he was a member of the UMC he was denied benefits to which he was entitled pursuant to his employment contract with UMC. Specifically, he alleges that when he was hospitalized, UMC breached his contract by improperly depriving him of hospital and sick benefit coverage as well as compensation to which he was entitled, and upon termination, by denying him retirement benefits. Rev. White does not rely on a written contract,[6] but alleges that his ordination and various church appointments give rise to an implied contract and implied covenants of good faith and fair dealing. *See Bloomgarden v. Coyer,* 156 U.S. App.D.C. 109, 116, 479 F.2d 201, 208 (1973). *Cf. Carnes v. Smith,* 236 Ga. 30, 222 S.E.2d 322 (1976) (trust arises from provisions of the church book of discipline).

While the Supreme Court has long held that civil courts are constitutionally prohibited from inquiring into allegations that would involve church polity and practices, the Court also has long recognized in limited circumstances that the church is not above the law. *See, e.g., Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775

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[6] Rev. White relies on *Jewish Center of Sussex County v. Whale,* 86 N.J. 619, 432 A.2d 521 (1981), and *Kupperman v. Congregation Nusach Sfard,* 39 Misc.2d 107, 240 N.Y.S.2d 315 (N.Y.Sup.Ct.1963), cases which involved written employment contracts. *See* note 11, *infra.*

(1979) (neutral principles applied to church property dispute). Federal circuit courts of appeal have held that the church is not above the law and may be held liable for valid contracts. *Minker v. Baltimore Annual Conference of United Methodist Church, supra,* 894 F.2d at 1358-59.[7] *See Rayburn v. General Conf. of Seventh-Day Adventists, supra,* 772 F.2d at 1171. *See also EEOC v. Southwestern Baptist Theological Seminary,* 651 F.2d 277 (5th Cir.1981), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982); *EEOC v. Pacific Press Publishing Ass'n., supra,* 676 F.2d 1272; *EEOC v. Mississippi College, supra,* 626 F.2d 477; *Whitney v. Greater New York Corporation of Seventh-Day Adventists,* 401 F.Supp. 1363 (S.D.N.Y.1975).[8]

As styled in his complaint, Rev. White has not clearly delineated how his benefit claims are separate from his ecclesiastical claims. In describing the nature of his contract he relies on the "contract of the highest degree of integrity" arising as a result of his ordination, which contract he claims he fully performed. Consequently, in order to reach Rev. White's contention that he was improperly denied benefits promised under his contract, the civil court would necessarily inquire into whether UMC accorded its minister the benefits to which he was entitled under a contract deriving from the Discipline. Rev. White does not allege the absence of a decision by

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[7] In *Minker* the pastor claimed a contractual breach relating to his assignment to a pastorage. His claims allegedly arose from a contract claim separate and apart from church policy or a church religious document. See 894 F.2d at 1360-61. In this respect, Rev. White's claim is readily distinguishable from that of Rev. Minker.

[8] *See* note 10, *infra.*

church officials or tribunal on these matters or that they do not involve questions of discipline, organization, faith or religious law. *See, Watson v. Jones, supra,* 80 U.S. (13 Wall.) at 727, 729, 20 L.Ed. 485 (church decision on discipline, faith, or ecclesiastical rule, custom or law must be accepted by civil courts). Indeed, his request for a declaration that he has exhausted his administration remedies suggests that there are such church remedies available to respond to his claims of entitlement to certain benefits.[9]

Although UMC does not concede that it had a contract with Rev. White, neither does it contend that it was not obligated to live up to its obligations to Rev. White. Rather UMC maintains that because Rev. White is a minister, these are matters of inquiry from which the civil courts are precluded. It relies on *Dowd v. Society of St. Columbans,* 861 F.2d 761; *McClure v. Salvation Army, supra,* 460 F.2d at 560 and *Hafner v. Lutheran Church-Missouri Synod, supra,* 616 F.Supp. at 737. These cases are not exactly on point, however. McClure involved a request that the court evaluate church practices with respect to sex discrimination. The contract claims for health and disability benefits in Hafner arose from a broad provision of a religious document to determine whether such benefit promises fell within that provision. Dowd is of little

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[9] We do not reach the issue of whether Rev. White has exhausted his administrative remedies. In his complaint, however, he refers to the fact that he appeared, without counsel, before the Executive Conference. His counsel also wrote to the chair of UMC's Conference Relations Committee expressing concern about Rev. White's hospital and disability benefits, referring in the letter to the exhaustion of administrative remedies.

assistance since the decision turned on inadequate factual allegations of wrongdoing by the defendant. Here, by contrast, Rev. White seeks, in an otherwise adequate complaint, *see* Super.Ct.Civ.R. 8(a), only to hold UMC to promises it allegedly made as the result of its own policy choices in the course of negotiating a contract with him.

Nevertheless, we conclude that a determination of Rev. White's benefit claims would involve more than simply the secular questions of whether such promises were made by UMC and, if so, whether the benefits were properly denied to Rev. White. His complaint links the circumstances of his contractual rights and alleged breaches to the circumstances surrounding his ordination and divestment of ecclesiastic endorsement. Rev. White's benefit claims are, as UMC contends, ancillary to his claim of improper divestment. Courts have, so far as we have found, unanimously recognized that such claims involve matters of church governance and are not purely secular matters, and in the absence of church invocation of the civil courts, resolution of such disputes is properly for church officials. *See, e.g., Hafner v. Lutheran Church-Missouri Synod, supra,* 616 F.Supp. at 739; *McClure v. Salvation Army, supra,* 460 F.2d at 559; *Dowd v. Society of St. Columbans, supra,* 861 F.2d at 764. *See also Gipe v. Superior Court for County of Orange,* 124 Cal.App.3d 617, 628, 177 Cal.Rptr. 590, 595.[10] Even in situations in which a written

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[10] In *Gipe* the court held that it had jurisdiction to determine whether severance pay had been conditionally promised to a minister and, if so, whether the conditions had been met, viewing the dispute as involving the ownership or right to property. The cases relied on in Gipe however, involve situations in which the church sought the intervention of the

contract has been involved, the basis for civil court jurisdiction in the cases on which Rev. White relies, turned on circumstances not present here.[11]

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civil court or the judgment of the civil court was reversed. *See Gipe v. Superior Court for County of Orange, supra,* 124 Cal.App.3d at 628, 177 Cal.Rptr. at 595 (citing *Eldership v. Church of God at Sharpsburg,* 396 U.S. 367, 368, 90 S.Ct. 499, 500, 24 L.Ed.2d 582 (1970) (regional church sued local churches and others to prevent withdrawal from regional church and to determine control of church property); *Presbyterian Church v. Hull Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969) (injunction granted to local churches to enjoin trespass on church property reversed since based on civil court interpretation of church doctrine); *Presbytery of Riverside v. Community Church of Palm Springs,* 89 Cal.App.3d 910, 920, 152 Cal.Rptr. 854, 859, *cert. denied,* 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979) (neutral principles of law applied to property dispute between general church and local church); *Samoan Congregational Christian Church in the United States v. Samoan Congregational Christian Church of Oceanside,* 66 Cal.App.3d 69, 75-77, 135 Cal.Rptr. 793, 796-98 (1977) (association of churches sued to impress trust on assets of member church); *Metropolitan Baptist Church of Richmond, Inc. v. Younger,* 48 Cal.App.3d 850, 858-59, 121 Cal.Rptr. 899, 903-05 (1975) (church petitioned for authority to distribute liquidated assets)). *See also Stony Island Church of Christ v. Stephens,* 54 Ill.App.3d 662, 12 Ill.Dec. 299, 369 N.E.2d 1313, 1317 (1977) (church sued to remove minister from church premises and to restrain interference with church property; vacation of arbitration award concerning contractual dispute regarding termination of services and right to possession of church property not involving any element of religion). Consequently, *Gipe* can offer little solace to Rev. White.

[11] For example, in *Kupperman v. Congregation Nusach Sfard, supra,* 39 Misc.2d 107, 240 N.Y.S.2d 315, a rabbi sued a congregation over his discharge and for salary that was due and sought injunctive relief. The court, in entering judgment for the rabbi, held that because the congregation had independent authority to call and remove its rabbi, the structure of the

Accordingly, the order denying the motion to dismiss the complaint is reversed and the case remanded to the trial court with instructions to dismiss the complaint.

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religious faith meant that the dispute at issue was a temporal matter concerning the authority to discharge and whether notice, as required under the contract, was properly given. In granting injunctive relief, the court, in effect, affirmed the rabbinical tribunal's decision in favor of the rabbi.

In *Jewish Center of Sussex County v. Whale*, 397 A.2d 712 (N.J.1978), the Jewish Center sought to rescind a contract with a rabbi on the ground that he had failed to disclose his prior criminal record and disbarment as an attorney, and to dismiss the rabbi's counterclaim based on breach of contract and specific performance.

Forest Hills Early Learning Center v. Grace Baptist Church, supra, 846 F.2d 260, involved a challenge brought by secular day care centers to a state statute exempting religiously affiliated child centers from state licensing requirements. The Fourth Circuit, citing *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos (Amos)*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987), held that the statute did not violate the establishment clause, reversing the District Court decision that state licensing requirements would not interfere with church-run child care centers and free exercise of religion and were justified by compelling state interest to the extent that they did. The Fourth Circuit concluded that there was no principled basis on which to distinguish between the result reached in *Amos, supra*, involving employment practices in a gymnasium, and "prevent[ion of] state interference with church programs that provide education and child care programs." 846 F.2d at 164.
